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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 459

DONALD M. JOHNSON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Donald M. Johnson, Petitioner, respectfully prays that a writ of Certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above cause on August 21, 1947, affirming the judgment of the United States District Court for the Middle District of Pennsylvania, convicting him of conspiring to commit an offense against the United States under Section 37 of the Criminal Code, 18 USCA § 88.

OPINIONS BELOW

The Opinion of the District Court denying motion for judgment of acquittal will be found in the Record at page 925a-937a, and the Opinion of the Circuit Court of Appeals will be found in the record at page 1223. Neither Opinion is reported as of this date.

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on August 21, 1947. A Petition for Rehearing was presented to the said court in due season, and on September 30, 1947, a rehearing was refused. No opinion was rendered. The Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended February 13, 1925 c, 229 § 1, 43 Stat. 938, 28 USCA 347.

SUMMARY STATEMENT OF THE FACTS AND OF THE MATTER INVOLVED

The Petitioner is one of ten defendants who were indicted on September 11, 1945, charged with conspiracy to obstruct justice in the Middle District of Pennsylvania and to defraud the United States (18 USCA § 88). The defendants were Albert W. Johnson, Senior Judge of the District Court of the United States for the Middle District of Pennsylvania, his three sons, namely, Miller A. Johnson, Albert W. Johnson, Jr., and Donald M. Johnson, your Petitioner, all members of the Bar, together with John Memolo, Jacob Greenes, Hoyt A. Moore, Joseph Paul Jennings, Charles Korman, and David Schwartz.

The Indictment contained forty-six overt acts, involving eleven different cases or proceedings in the District Court in which some action was claimed to have been taken by Judge Albert W. Johnson in violation of his duty and by means of which it was contended that the defendants and co-conspirators not named as defendants conspired together to effect the object and purpose of the conspiracy. The eleven cases mentioned as involved in the conspiracy are as follows:

1. Mt. Jessup Coal Company case;
2. Pennsylvania Central Brewing Company case;
3. Continental Cigar Company case;
4. Dervas Tobacco Company case;
5. Giant Drygoods Company case;
6. Charles Korman case;

7. Wilkes-Barre and Eastern Railroad Company case;

8. Theodore Koppelman case;

9. Kizis case;

10. Central Forging case; and

11. Williamsport Wire Rope Company case.

On Motions, the Indictment was dismissed against the defendants Hoyt A. Moore and Charles Korman, on the grounds that the matters in which they were involved were separate conspiracies and that as to them no overt act had occurred within the statutory period of three years prior to September 11, 1945. Charles Korman was concerned in his own case, which is No. 6 above, and Hoyt A. Moore, prominent member of the New York Bar, was alleged to have been involved in the Williamsport Wire Rope Company case, which is No. 11 above.

The defendant, Joseph Paul Jennings, had died prior to the date of the trial; a separate trial was granted as to David Schwartz because of illness.

The jury rendered verdicts of acquittal in favor of Judge Alfred W. Johnson and Albert W. Johnson, Jr., and verdicts of guilty against Miller A. Johnson, John Memolo, Jacob Greenes and your Petitioner, Donald M. Johnson.

On appeal, the Circuit Court of Appeals reversed the judgment of conviction of Miller A. Johnson for the reason that his participation was confined to only one incident having to do with the Williamsport Wire Rope Company case, and that the evidence was insufficient to establish his participation in the conspiracy charged, and affirmed

the conviction of John Memolo, Jacob Greenes, and your Petitioner.

As to Greenes and Memolo, each had made declarations before the Grand Jury, and this testimony was admitted in the case at bar against the declarant only. As to this Petitioner, Donald M. Johnson, the Circuit Court held that there was only one overt act within the Statute of Limitations. This overt act was not set forth in the Indictment. The Trial Judge charged the jury not to consider any overt acts not charged in the Indictment. However, the Circuit Court found that there was not a strong case against your Petitioner, but that this one overt act was sufficient upon which to base his conviction. Of the eleven cases mentioned in the Indictment, Petitioner is alleged to have been involved in only three of them, as follows:

I. *Giant Dry Goods Case.* The evidence was that Jacob Levy, uncle of Jacob Greenes, one of the defendants, requested Donald M. Johnson to secure for him an appointment as appraiser should the opportunity arise. There is no testimony that Levy promised Petitioner any part of his fee should he receive an appointment in any case. Some time afterward, in 1940, Levy was appointed appraiser in this Giant Dry Goods Case. He testified that Greenes demanded $250 out of his $350 fee. There is nothing in the testimony to show any connection of Donald M. Johnson with this transaction, or in fact, to show that he actually secured the appointment of Levy in the case above-mentioned (R. 117a-122a).

II. *The Central Forging Case.* The background and facts in this case were practically the same as presented

by the United States Government in the case of United States of America vs. Robert M. Michael, Harry Knight, George Fenner, Homer N. Davis and Donald M. Johnson, at No. 11348 Criminal, in the District Court for the Middle District. The Indictment in the first case involved the charge of conspiracy by the said defendants to secrete and conceal assets of the bankrupt Central Forging Company Estate. This case was heard by Hon. William F. Smith, Specially Presiding, and a jury, at Scranton, Pa. The trial lasted four weeks. The jury returned verdicts of acquittal in favor of your Petitioner, Donald Johnson, and Homer N. Davis, and verdicts of guilty as to defendants Knight and Fenner. The defendant Michael had previously pleaded guilty and testified as a Government witness.

This Petitioner pleaded that all of the facts concerned therein were res adjudicata in this proceeding, so far as concerned him, because he was acquitted of the crime for which he was indicted in the Central Forging Company case. The Trial Judge in the case at bar instructed the jury that it should not consider against Donald M. Johnson *any overt act* charged in the Central Forging Company case, which *overt act* was also charged in the case at bar. In this the Trial Judge was sustained by the Circuit Court of Appeals, on appeal, which dismissed from consideration any alleged overt act in connection with the Central Forging Company case.

However, the Trial Judge did not exclude from the jury's consideration the *facts* of the Central Forging case which had been introduced into evidence by the Government as part of its case and concerning which Petitioner's counsel made every effort to have excluded (R. 234a).

Failing in this, he endeavored to offer the record in the Central Forging case for the purpose of showing that the facts proven therein were the same as those in the case at bar, but the Trial Judge ruled that such record was inadmissible and the former acquittal of no consequence (R. 547-550). The Circuit Court found that the Trial Judge had adequately protected the Petitioner when he instructed the jury "that nothing which occurred that was connected in any way with the Central Forging case should be determined in considering his guilt" (R. 1226). A reading of the Charge on this point (R. 888a) indicates that the Circuit Court erroneously construed the instruction of the Judge, and that all the instruction did was to require the jury not to retry the Charge in the Central Forging case, that is, "the overt acts that are mentioned in the Central Forging case Indictment." Overt Act No. 5 in the Central Forging case is the filing of the account of Robert D. Michael, successor-trustee, on July 9, 1943 (R. 545a). Overt Act No. 33 in the case at bar is the filing of the account of Michael in the Central Forging case on July 9, 1943 (R. ———). This was within the statutory period, but was expressly excluded from the jury's consideration as to the guilt of Donald M. Johnson by the Charge of the Court above-noted, and also was excluded by the Circuit Court as an overt act as to Donald M. Johnson (R. 1226).

III. *The Williamsport Wire Rope Case.* This is the most involved of the eleven cases presented by the Government in support of its contention that there was a single conspiracy among the named defendants to obstruct and impede justice in the Middle District of Pennsylvania and to defraud the United States. Most emphasis was given to

this primarily because of the amount of money involved in the acquisition of the assets of the Wire Rope Company by the Bethlehem Steel Company. The receivership in the Wire Rope Company lasted over six years and was one in which numerous administrative steps occurred before the final sale of the property. John Memolo, one of the defendants, was co-counsel for the receivers, and much of the testimony revolves about the matter of fees for himself, for the accountant Maloney, and others. There was testimony that Donald M. Johnson, either alone or in company with Memolo, visited Judge Johnson in his Chambers several times during the pendency of this receivership; that Donald M. Johnson made inquiries of the Deputy Clerk about the proceeding and told him not to file the Opinion in the Wire Rope case until "the Boss said so", the "Boss" being Judge Johnson (R. 147a-159a-161a). The final decree in this receivership was signed on December 15, 1938, and the receivers discharged.

(Overt Acts Within the Statutory Period)

The Circuit Court expressly excluded Overt Act No. 33, the filing of Michael's report in July of 1943, as one to be considered by the jury in deciding the guilt or innocence of Donald M. Johnson, Petitioner. The Opinion makes it quite clear that so far as concerns Petitioner there is only one overt act to be considered, and that is the $350 check transaction in October of 1942. According to the testimony of Abe Greenes, brother of Jacob Greenes, a co-defendant,

by direction of his said brother, he, Abe Greenes, sent a check in the amount of $350 payable to "Donald M. Johnson, Attorney"; his brother Jacob gave him the cash and requested that the check be sent. He did not know what it was for, but Donald M. Johnson, testifying in his own behalf, stated that it was for attorney fees. The Circuit Court based its affirmance of the conviction upon this incident, because without it there was no overt act proven against Donald M. Johnson within the statutory period.

However, as pointed out above, (p. 5) the Trial Court excluded this act from consideration by the jury for the reason that it was not set forth in the Indictment by instructing the jury that they must find an overt act, "charged in the indictment, committed in pursuance of the conspiracy after that date (i. e., Sept. 11, 1942)" (R. 863a).

All of the appeals in these cases were argued together, and the case was very much complicated by the presence therein of the Grand Jury testimony which was admissible only against Jacob Greenes or John Memolo, the testimony relative to the Central Forging case which Petitioner contended was admissible against all of the defendants excepting himself, and the general complication of the matter by the presence of so many defendants as well as co-conspirators not named as defendants, and so much subject matter. It was further complicated by the fact that many of the defendants were not participants in some of the cases involved.

On Petition for Rehearing, your Petitioner urged the Circuit Court to reconsider its action in affirming the Lower Court, calling attention particularly to the fact, which had

been urged in the arguments, both oral and written, that the $350 check was not submitted to the jury as an overt act and was an isolated instance, shown to have no relation whatever to anything in the case, and was therefore not the basis of the finding of the jury of an overt act committed within the statutory period. The Trial Judge had specifically restricted the jury in its consideration of overt acts to the forty-six which are set out in the Indictment, and therefore the finding of the Circuit Court that they could base the conviction upon their finding that "the $350 check transaction had as its purpose the covering of an illegal transaction," was without basis as to petitioner.

The Petitioner also repeated in his Petition for Rehearing the argument theretofore made that, from the manner of Indictment and trial, it was quite apparent that there was not one single conspiracy proven, but a number of independent acts, many of which were not related to or dependent upon each other, the only figure holding them together being that of Judge Albert W. Johnson, and that when he was removed by a verdict of acquittal, the heart and core of a single conspiracy was torn out, and therefore only separate conspiracies may have existed, and under the case of *Kotteakos v. United States*, 382 U. S. 750, 66 S. C. 1239, this Petitioner was entitled to a judgment of acquittal.

Other matters raised were prejudicial error committed by the Trial Judge in refusing to withdraw a juror and continue the case because of improper remarks of the Government attorney; the error of the Trial Judge in stating to the jury that some of the overt acts had been proven; his error in failing to instruct the jury to find when the

conspiracy began and ended; prejudicial error in the Charge relative to the effect of character evidence; and the refusal of the Trial Judge to apply the doctrine of res adjudicata or estoppel as above-noted.

QUESTIONS PRESENTED

1. Section 37 of the Criminal Code (18 USCA § 88) requires not only a conspiracy or agreement between two or more persons, but also an act to effect the object of the conspiracy, which act must be performed within the period of three years prior to the indictment: *Brown v. Elliott*, 225 U. S. 392; 32 S. C. 812-815; *Pinkerton v. United States*, 145 F(2) 252-254 (CCA 5). The Circuit Court of Appeals based its affirmance of the conviction of Donald M. Johnson upon the jury's finding of one overt act within the statutory period, namely the receipt of $350 check which had no connection with any of the cases referred to in the overt acts of the Indictment and was itself not included as one of the forty-six overt acts. Was not this action of the Circuit Court erroneous in view of the fact that the jury, in its consideration of overt acts, was specifically restricted by the Trial Judge to the forty-six acts which are set out in the Indictment, and was not this decision of the Circuit Court in conflict with the decision of the Supreme Court of the United States in re *Herron v. Southern Pacific Co.*, 283 U. S. 91, 51 S. C. 383, as well as the later cases of *Quercia v. United States*, 289 U. S. 466, 53 S. C. 698-699, and *Gregory v. Morris*, 96 U. S. 619, 24 L. Ed. 740, which declare that it is the duty of the jury to follow the law as it is laid down by the court, and that there is a presumption it did so?

2. Is not the decision of the Circuit Court in conflict with the decision of the Supreme Court of the United States in re *Kotteakos v. United States*, 328 U. S. 750, 66 S. C.

1239, as to the requirements for proof of a general conspiracy, as all that was proven by the Government in this case was a set of isolated circumstances having no connection with each other and existing, if at all, at disconnected periods of time?

3. The name of Donald M. Johnson, this Petitioner, is mentioned very few times in the Transcript exceeding 3,000 pages of testimony. There was no direct evidence that Donald M. Johnson ever became a party to the alleged conspiracy, and in deciding that the circumstantial evidence upon which his connection therewith is based was sufficient, the Circuit Court has decided the question in conflict with the decision of the Supreme Court of the United States in *United States v. Ross,* 92 U. S. 281-284, 23 L. Ed. 707 and with its own decision in the case of *United States v. Russo,* 123 F (2) 420.

4. Did not the Circuit Court err in, after finding that the propositions of law submitted by Petitioner on res adjudicata or estoppel, were correct, refusing to apply them to the facts of this case, and in finding that the Trial Judge's Charge was adequate to protect the rights of the defendant? In referring to the Central Forging Case the Circuit Court, in its Opinion at page 1226, stated: "Since Donald M. Johnson is to have the benefit of the Trial Judge's instruction that nothing which occurred that was connected in any way with the Central Forging case should be considered in determining his guilt, Michael's filing in the Central Forging case cannot be used against Donald M. Johnson." By "Michael's filing," the court means the filing of Robert Michael of his account as Trustee in the

Central Forging case, which was charged as an overt act in the case of *United States v. Fenner, et al.*, and in which case Donald M. Johnson was acquitted. This finding of the Circuit Court is not borne out by the record as the court overlooked the fact that what the Trial Judge said to the jury was:

> "That you do not retry as to Donald Johnson, the charges in the indictment which is in evidence and which I have outlined to you, and specifically, that you shall not consider in this case as to him the overt acts which are mentioned in that Central Forging case indictment. You will find them listed, there are five of them, and it includes the receiving of $2,500.00. * * * In that regard you pay no attention to those specific acts in the Central Forging Case as regards Donald Johnson. However, all of the other matters in evidence are also as to him" (R. 888a).

All that the Trial Judge did in thus charging the jury was to tell them that the *overt acts* charged in the Central Forging Case would not be considered in determining the guilt of Donald M. Johnson. Counsel for Donald M. Johnson had requested the Court to charge that the jury must not re-try the *facts* in the Central Forging Case as to Donald M. Johnson. As an example of this, there was the perjury of Robert Michael, committed within the statutory period for a prosecution in the case at bar, but pertaining only to the Central Forging Case, and not listed as an overt act in either case. It will be noted that the court charges as one of the overt acts which must not be considered "the receiving of $2,500". The Trial Judge did not exclude the

perjury of Michael nor the conversation alleged to have occurred between Michael and Donald M. Johnson as to the testimony of Michael. Prior, in the course of the trial, the Trial Judge had refused to permit Donald M. Johnson to introduce into evidence the record of the Central Forging Case so as to show that the *Facts* in that case and the *Facts* in the same matter introduced at this trial were the same.

5. Did not the Circuit Court err in finding that the Charge of the Trial Court was sufficient, relative to the beginning and ending of the alleged conspiracy?

6. Did not the Circuit Court err in its finding as to the Charge of the court on character evidence, deciding that the charge was correct and within the decisions of this court in *United States v. Quick*, 128 F(2) 832 and *United States v. Frishling*, 160 F(2) 370, for the reason that the said decision is in conflict with that of the decision of the Supreme Court of the United States in *Edgington v. United States*, 164 U. S. 361-66, 17 S. Ct. 72-74, 41 L. Ed. 467, to the effect that "good character when considered in connection with the other evidence in the case may generate a reasonable doubt; the circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although, without it, the other evidence would be convincing."

7. Did not the Circuit Court err in affirming the action of the Trial Judge in refusing to withdraw a juror and continue the case because the prosecuting attorney referred to Hoyt A. Moore, Attorney-at-Law, as "a criminal conspirator?"

8. Did not the Circuit Court err in affirming the action of the Trial Judge in deciding as a matter of law that certain overt acts "were proven" (without specifying which of the forty-six acts he referred to as proven) instead of submitting the facts to the jury for such finding, thereby usurping the functions of the jury?

REASONS FOR ALLOWANCE OF THE WRIT

1. The decision of the Circuit Court of Appeals is in conflict with the decisions of this Court relative to the requirement that an overt act be committed within the statutory period in order to convict defendant of conspiracy under 18 USCA § 88.

2. The decision of the Circuit Court of Appeals is in conflict with the decisions of this Court which require the jury to accept the law as stated by the Trial Judge, even though it be erroneous and which presume that the jury has followed such instructions.

3. The decision of the Circuit Court is in conflict with the decision of this Court in re *Kotteakas v. United States, supra,* as to the requirements of proof of a general conspiracy and connection of Petitioner therewith.

4. The decision of the Circuit Court is in conflict with the decision of this Court as to the effect of character evidence in a criminal case.

5. The decision of the Circuit Court is in conflict with the decisions of this Court relative to the application of the doctrine of res adjudicata or estoppel in a criminal case.

6. All of the defendants who were tried, excepting John Memolo, Jacob Greenes, and your Petitioner, have been acquitted either by the verdict of the jury or by the judgment of the Circuit Court. Memolo and Greenes were found by the Circuit Court, by reason of their admissions before the Grand Jury which were offered in evidence

against them, to have "virtually confessed their guilt." Only your Petitioner remains and as to him the Circuit Court found "that there is not so strong a case because the damaging Grand Jury admissions were available only against those who made them" (R. 1228). The evidence admissible against Donald M. Johnson is not nearly so voluminous as against Judge Albert W. Johnson and Albert W. Johnson, Jr., who were acquitted by the jury, and no more serious than against Miller A. Johnson, who was granted judgment of acquittal by the Circuit Court. However, all the evidence, including the Grand Jury testimony and the Central Forging case, was before the jury, and while the use of the same was restricted by the Trial Judge, it was heard by them day after day for four weeks, and it must have been impossible to disassociate and distinguish the competent from the incompetent testimony when considering any single defendant. Even the Opinion of the Circuit Court shows the influence of this inadmissible testimony, perhaps subconsciously only, but nevertheless, present in the minds of the learned Judges.

7. Donald M. Johnson, Petitioner, has been illegally convicted, as the requirements of Section 37 of the Criminal Code (18 USCA § 88) have not been met by the Government's proof.

For the reasons hereinbefore set out, it is respectfully submitted that the Petition for Certiorari should be granted.

Respectfully submitted,
CHARLES J. MARGIOTTI,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The statute under which your Petitioner was convicted is section 37 of the Criminal Code (18 USCA § 88), which reads as follows:

> § 88 *(Criminal Code, section* 37.) ***Conspiring to commit offense against United States.*** If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

To sustain a conviction under the said statute, it is imperative that the Government shall have proven beyond a reasonable doubt all of the elements of the offense, namely, a conspiracy or agreement among the several parties involved to commit an offense against the United States, and also an overt act to effect the object of the conspiracy. The Statute of Limitations, namely, R. S. § 1044, as amended December 27, 1927, 45 Stat. 51, 18 USCA 582, requires that the Indictment must be found within three years next, after the offense shall have been committed. In *Brown v. Elliott*, 225 U. S. 392; 32 S. C. 812-815, and similar cases, it is held that the overt act required by Section 37 must have been performed within the period of three years prior to the finding of the Indictment; otherwise, there can

be no conviction under the said section of the Criminal Code.

I. NO GENERAL CONSPIRACY PROVEN AS REQUIRED BY KOTTEAKAS CASE.

The Circuit Court in the case at bar found that there was sufficient evidence of a general conspiracy among the defendants and co-conspirators or some of them, and of the connection of Donald M. Johnson, Petitioner, therewith. It has been the position of Petitioner that this case has not met the requirements of the decisions of the Supreme Court relative to the subject involved. The eleven separate and distinct cases referred to in the Indictment were unrelated to each other and possessed no connecting link, excepting that Judge Albert W. Johnson was the presiding judge in each of them. In his argument before the Circuit Court, both oral and written, Petitioner sought to impress upon the court this fact, but a reading of the Opinion shows that the court misunderstood entirely Petitioner's position. It was urged that throughout the entire trial Judge Albert W. Johnson was referred to as the "heart and core of the conspiracy" and that if he were omitted from the case as a conspirator, there was nothing to connect the several proceedings, and each revolved upon its own axis as a separate conspiracy. It was not the contention of the Petitioner that because Judge Albert W. Johnson was acquitted by the jury he likewise must be acquitted; but rather that the acquittal of Judge Albert W. Johnson removed him as an alleged

conspirator, and the key figure, so that there was nothing left but a number of separate conspiracies. The Trial Judge had correctly instructed the jury that they must find one conspiracy in order to convict any of the defendants, and referred also to the fact that there was a separate conspiracy in the Central Forging case.

This separate conspiracy theory was also borne out in the Circuit Court's Opinion, when it directed a Judgment of acquittal for Miller A. Johnson because he was involved only in the Williamsport Wire Rope case. This theory had been accepted and applied by Judge Smith, specially presiding in the Middle District, when he ordered the dismissal of Charles Korman and Hoyt A. Moore as defendants, because they were involved respectively in the Korman case and in the Williamsport Wire Rope case.

It is the contention of the Petitioner that the decision of the Circuit Court on this question is in direct conflict with the decision of the Supreme Court of the United States in *Kotteakas v. United States*, 328 U. S. 750, 66 S. C. 1239, and with the decision of the Court of Appeals for the Ninth Circuit in the case of *Canella v. United States*, 157 F(2) 470. *Kotteakas v. United States* was a prosecution under the section of the Code above-referred to for conspiracy to violate the provisions of the National Housing Act. The defendants were indicted for a single conspiracy as in our case, but the proof showed a number of independent conspiracies. The Supreme Court stated that "the jury could not have possibly found from the evidence that there was only one conspiracy" (page 1249), and again at page 1252, the Supreme Court says:

"We do not think that either Congress, when it enacted Section 269, or this Court, when deciding the Berger case, intended to authorize the Government to string together for common trial eight or more separate and distinct crimes, conspiracies relating in kind though they might be, when the only nexus among them lies the fact that one man participated in all."

Canella, et al. v. United States followed the ruling in the *Kotteakas* case, holding that where an Indictment alleged a single conspiracy to defraud the United States, and the proof showed existence of five conspiracies involving at least twelve persons, and with four of which conspiracies two of the defendants were not concerned, there was a fatal variance as to such defendants. In our case the evidence available against Donald M. Johnson, Petitioner, shows that he had no knowledge of and had no connection with the following alleged conspiracies:

1. Mt. Jessup Coal Company case;
2. Pennsylvania Central Brewing Company case;
3. Dervas Tobacco Company case;
4. Charles Korman case;
5. Continental Cigar Company case;
6. Wilkes-Barre and Eastern Railroad Company case;
7. Andrew Kizis case;
8. Theodore Koppelman case.

Likewise, the evidence is wholly bare of facts that Donald M. Johnson knew four of the ten defendants named

in the Indictments: Hoyt A. Moore, Joseph Paul Jennings, Paul Korman, and David Schwartz, or that he knew four of the five persons named in the Indictment as co-conspirators but not as defendants, namely, Kilcullen, Martin Memolo, Crolly, and Maloney.

Both the Trial Court and the Circuit Court proceeded on the theory that the single conspiracy charged in the indictment could be established by evidence of transactions between Memolo and Greenes with other conspirators, whose common purpose with Donald Johnson had not been shown. We think that the *failure to establish this common purpose* left each of the transactions between Memolo and Greenes, and parties other than Donald Johnson independent of him and without his knowledge, separate and distinct alleged conspiracies.

If we take the cases against Memolo and Greenes—including the evidence ruled available against all defendants, plus their Grand Jury admissions—we find proof of a single conspiracy in which either Judge Johnson or Greenes was the common key figure. Even in the cases against Memolo and Greenes, however, we find from their admissions the existence of several separate conspiracies—for example, the alleged conspiracy between Donald Johnson, Robert Michael and others in the Central Forging Company case, and the alleged conspiracy between Miller Johnson, Albert W. Johnson, Jr., Donald Johnson and Townsend in the Williamsport Wire Rope Company case. The point to be remembered is that under this theory of the case the common key figure—if any—would have been either Judge Johnson or Greenes.

Yet, when we consider the evidence which was ruled admissible as against all defendants, we find at least four separate theories as to the character of the alleged conspiracy or conspiracies involved. The only question is whether the defendant has suffered substantial prejudice from being convicted of a single great conspiracy by evidence, which viewed in the light most favorable to the Government, proved not one conspiracy, but some eight or more different alleged conspiracies of the same sort, executed not through a common key figure similar to Simon Brown in the Kotteakos case, but executed with no key figure appearing in all of said alleged conspiracies.

The Government's evidence as it applies to all defendants shows that there was no common and key figure in all of the transactions alleged to have been proven, a key figure similar to Brown in the Kotteakos case, or the key figure in the Canella case.

For the purpose of this argument only, we are assuming that certain conspiracies were proved. If so, we find:

(1) That *Greenes* was the common key figure with others in these cases:

(a) With Memolo and Kilcullen in the Mt. Jessup Coal Co. case;

(b) with Memolo and Maloney in the Pennsylvania Central Brewing Co. case;

(c) with Bartikowsky in the Pennsylvania Central Brewing Co. case;

(d) with Memolo, Katz and Korman in connection with the imposition of sentence in the Korman case;

(e) with Korman and his attorney in connection with the application of termination of probation in the Korman case;

(f) with Jacob Levy and Donald Johnson in the Giant Dry Goods case;

(g) and with Memolo and Maloney in the Williamsport Wire Rope Co. case.

(2) *Memolo* was the common and key figure with others in these cases:

(a) with Moore, Mumford, McMath, Martin Memolo, Crolly, Taylor, and Maloney in the Williamsport Wire Rope Company case;

(b) with Judge Johnson, Albert Johnson, Jr., and Donald Johnson in the Wire Rope Company case.

(3) Totally separate from the foregoing two series of conspiracies, we find two disconnected alleged conspiracies in these cases:

(a) between Judge Johnson, Miller Johnson, Albert Johnson, Jr., Donald Johnson and Townsend in the Williamsport Wire Rope Company case; and

(b) between Judge Johnson, Donald Johnson, Michael, Reifsnyder, Fenner, Knight and Davis in the Central Forging Company case.

(4) And aside and apart from the foregoing three sets of conspiracies, we have hanging in mid-air:

(a) a $350.00 check, given by Abe Greenes at Jacob Greenes' request to Donald Johnson, attorney.

No connection was shown between the other defendants and co-conspirators involved in:

Group (1) where Greenes was the key figure;

Group (2) where Memolo was the key figure;

and Donald Johnson, other than the testimony of the witnesses Moran, Beecham, Kalp and Martin, as to associations between Donald Johnson and Greenes, the testimony of the witness Houck that he had seen Donald Johnson and Memolo in Judge Johnson's office in 1937 in connection with the Williamsport Wire Rope Company case, and that, on various occasions, Donald Johnson had inquired of him as to the status of certain unknown cases with which petitioner had no connection, and also other than the testimony of the witness Katz, that at one time Greenes had told him to see him if he wanted cases fixed in the Federal Court in Scranton. In many cases other defendants and co-conspirators did not have any relationship with one another—not even Greenes or Judge Johnson or Memolo's common connection with each case, as the Supreme Court had in Brown's connection with each transaction involved in the Kotteakos case.

No connection was shown between the other defendants and co-conspirators involved in group (3) and those named in groups (1) and (2).

We contend that both the Trial Court and the Circuit Court ignored the existence of separate transactions, which would bring this case within the rulings of the Kotteakos and Canella cases. This was a complicated case not only for the attorneys for defendants and the prosecuting attor-

neys, but also for the trial court and, especially, for the jury.

The Circuit Court acknowledged this difficulty at page 1228 of its Opinion:

> "The case was complicated for the jury and for us by the fact that a great deal of important testimony, due to the various exclusionary rules of evidence was not available against all defendants. Thus, some very damaging testimony of previous statements to a Grand Jury was available only as against defendants Memolo and Greenes. Again, defendant Donald Johnson had previously been acquitted of charges growing out of one of the particular incidents which was part of the Government's case. He was entitled to such protection as the law gives him by the fact of that acquittal * * * The jury had to consider the testimony given in the course of a long trial and its different bearing upon different defendants."

Unlike the Kotteakos case, we have no pattern of "separate spokes meeting at a common center, without the rim of the wheel to enclose the spokes." All we have are three groups of spokes lying loose in space, not only without the rim of the wheel to enclose the spokes, but also meeting at no common center. And lying far away we find a small spoke (the $350.00 check transaction), far too broken to be affixed to any wheel.

We cannot even apply the analogy used in the comment by the Court of Appeals in the *Kotteakos case*, 151 Fed. 2d at 173—that, "thieves who dispose of their loot to a single receiver—'a single fence'—do not by that fact

alone become confederates, they may be, but it takes more than knowledge that he is a 'single fence' to make them such''. Neither did all the defendants and conspirators in this case become confederates merely because at one time or another they had associations with either Greenes or Memolo.

It is submitted that this case is analogous to the Kotteakos case where one conspiracy only was charged and at least eight, having separate though similar objects, were made out by the evidence. Here the Indictment likewise charged only one conspiracy, but the evidence, if believed, showed that the more than fifteen parties participating in the eleven or more different schemes were on the whole, except for three separate sets of common key figures, different persons who did not know or have anything to do with one another.

In *United States v. Gordon*, 138 F. (2) 174 (CCA. Ill.) it was held that the common design which is the essence of the crime of conspiracy may be made to appear when the parties steadily pursue the same object whether acting separately or together by common or different means, ever leading to the same unlawful result. Accord: *American Tobacco Company v. United States*, 147 F. (2) 93 (CCA. Ky.) aff. 66 Supreme Court 1124.

It is submitted that the activities of the various defendants and co-conspirators were not so numerous in this case as to constitute a course of business, or so related as to constitute a system of unlawful conduct continuing over a long period of time as to warrant the jury in finding the

defendants guilty of a great general single conspiracy. Although an agreement for conspiracy may be shown by a concert of action where all parties work together understandingly with a single design for accomplishment of a common purpose, the record in this case is bare of any facts to show either a single design or common purpose. There is absolutely no connection between the arrangement made between Greenes and Bartikowsky in the Pennsylvania Brewing Company case, the arrangements made between Greenes, Memolo and Maloney in the Pennsylvania Central Brewing Company case and in the Williamsport Wire Rope case, the arrangements made between Greenes, Korman and Memolo in the Charles Korman case, and the arrangements alleged to have been made between Greenes, Korman and Memolo in the Charles Korman case, and the arrangements alleged to have been made between Miller Johnson, Townsend, Judge Johnson, Albert Johnson, Jr., and Donald Johnson in the Williamsport Wire Rope Company case, or the arrangements alleged to have been made between Memolo, Moore, McMath, Martin Memolo, Crolly and Maloney in the Wire Rope case, or the conspiracy alleged to have existed in the Central Forging Company case between Donald Johnson, Michael, Reifsnyder, Fenner, Knight and Davis.

Here there was no purpose common to Donald Johnson or Schwartz, nor to Donald Johnson or Kilcullen, nor to Donald Johnson or Maloney or Korman, nor to Donald Johnson or any of the others whose acts formed separate spokes in this rimless wheel. Nor was there any evidence connecting Donald Johnson with the conspirators named in groups (1) and (2).

The Government contends that long before he knew of the Korman case, Greenes told Katz that any time he wanted a case fixed in the Federal Court in Scranton, he should see him. To insert Donald Johnson into a broad conspiracy to sell justice merely on this statement and on his association with Greenes, is merely conjectural and speculative, and is not sufficient to give rise to an inference that Donald Johnson was engaged in a general conspiracy with Greenes and Memolo.

It is respectfully submitted that this is a stronger case for the application of the ruling in the Kotteakos case than were either the facts in that case or in the later Canella case. In the Kotteakos case the proof showed eight separate conspiracies and thirty-two conspirators. In the Canella case the proof showed five separate conspiracies, and twelve conspirators. In the case at bar, there is proof of more than eleven separate alleged conspiracies in which fifteen named and many other parties are alleged to have participated as conspirators. Not only were there probably as many conspirators involved in this case, but there were certainly more separate and distinct conspiracies alleged proved than were in either the Kotteakos or Canella case. Without doubt, it is "highly probable that the error (of mass trial) had substantial and injurious effects or influence in determining the jury's verdict" (66 Supreme Court, 1253).

II. ERROR OF CIRCUIT COURT IN DECIDING THAT PETITIONER WAS MEMBER OF ALLEGED GENERAL CONSPIRACY

The Circuit Court of Appeals found not only that there was a general conspiracy but also that there was sufficient evidence to connect Donald M. Johnson therewith (R. 1228). As set forth in our Petition for Certiorari (pages 5-8), the evidence tending to connect Donald M. Johnson with any of the overt acts charged in the Indictment was confined to three cases, namely, the Giant Dry Goods Company case, the Central Forging Company case, and the Williamsport Wire Rope Company case. In order to find that he was a member of a general conspiracy to obstruct justice in the Middle District of Pennsylvania, which alleged conspiracy was in progress and operation for a period of more than ten years, certainly something more is required than the evidence of chance meetings between Donald M. Johnson and John Memolo, the presence of Jacob Greenes in the office of Donald M. Johnson, conferences between Donald M. Johnson and Judge Johnson, his father, the nature of which did not appear in the evidence, and similar insignificant occurrences. The law requires much more in order to brand a man as a member of a criminal conspiracy. In the case of *Dennert v. United States*, 147 Fed. 2d 286 (CCA. Ky.) and in *United States v. Koch*, 113 Fed. 2d 982 (CCA. N. Y.) the Court of Appeals held that the defendant's participation in or knowledge of a conspiracy might not be inferred from his casual and unexplained meetings with others charged in the indictment.

In *United States v. Falcone*, 311 U. S. 205 61 S. C. 204, (1940 at page 206), the Supreme Court stated:

> "But it could not be inferred from that (that one of the defendant's customers * * * was using the purchased material in illicit distilling), or from the casual and unexplained meetings of some of the respondents with others who were convicted as conspirators that respondents knew of the conspiracy. The evidence respecting the volume of sales to any known to be distillers is too vague and inconclusive to support a jury's finding from the size of the purchases even though we are to assume what we do not decide that the knowledge would make them aiders or abettors of the conspiracy. Respondents are not charged with aiding and abetting illicit distilling, and they cannot be brought within the sweep of the Government's conspiracy dragnet if they had no knowledge that there was a conspiracy."

In *United States v. Andolschek*, 142 Fed. 2d 503 (CCA. N. Y.) the Court of Appeals for the 2nd Circuit held that the fact that A makes a criminal agreement with B does not cause A to become a party to the conspiracy into which B may enter or may have entered with third persons, but the scope of the agreement actually made, measures the agreement. A party to a conspiracy need not know the identity or even know the number of his confederates. But when he embarks on a criminal venture of a definite outline, he takes his chances as to its contents and member, if they fall within the common purpose as he understands them, but he must be aware of those purposes, and must

accept them and their implications if he is to be charged with what others may do in execution of them.

In *Canella v. United States, supra*, it was held that mere knowledge that a conspirator is engaged in other criminal conspiracies with other persons of the same general nature is not sufficient to make him a party conspirator thereto.

The Petitioner respectfully contends that any attempt to connect him with a general conspiracy in this case must be based upon circumstantial evidence entirely, and that the implied finding of the Circuit Court that the circumstances existed in this case is in conflict with the decision of the Supreme Court in *United States v. Ross*, 92 U. S. 281-284, 23 L. Ed. 707, which requires that "whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved and not themselves presumed". This statement of the law was followed by the Circuit Court for the Third Circuit in the case of *United States v. Russo*, 123 F. (2) 420, where after quoting the foregoing portion of the opinion in the Ross case, the Circuit Court, per Circuit Court Judge Jones, says, at page 423:

> "A presumption may not be rested upon another presumption. United States v. Ross, supra, 92 U. S. at page 283, 23 L. Ed. 707; Dahly v. United States, 8 Cir., 50 F. 2d 37, 43; Ribaste et al. v. United States, 8 Cir., 44 F. 2d 21, 23; Gerson v. United States, 8 Cir., 25 F. 2d 49, 60; Brady v. United States, 8 Cir., 24 F. 2d 399, 404. The rule could not be otherwise if the legally permissible effect of circumstantial evidence is to receive due respect. In order to justify a conviction

of crime on circumstantial evidence it is necessary that the directly proven circumstances be such as to exclude every reasonable hypothesis but that of guilt. See United States v. Baker et al., 2 Cir., 50 F. 2d 122, 123; Glass v. United States, 3 Cir., 231 F. 65, 68; Hart v. United States, 3 Cir., 84 F. 799, 808."

In the *Russo* case the Circuit Court directed a judgment of acquittal, saying:

> "In a case, therefore, such as the present, where there is an utter want of any evidence as to the defendant's knowledge that the property was stolen (except for his constructive possession thereof), an inference of his innocence of any such knowledge is as readily deducible as is an inference of knowledge. It follows therefore that the evidence was insufficient to support a conviction."

We respectfully submit that if the jury and the court had been able to disassociate from consideration the Grand Jury testimony admissible only against Greenes or Memolo, there would have been left no foundation upon which to rest a finding of the connection of this Petitioner with the alleged general conspiracy. Each of his actions is as consistent with his innocence as with his guilt; therefore, under the foregoing decisions, he should have been acquitted.

III. NO OVERT ACT FOUND WITHIN THE STATUTORY PERIOD

As above-noted, the Criminal Code requires not only a conspiracy and the defendant's connection therewith, but also that an overt act to effect the object of the conspiracy must be found by the jury within the statutory period of three years prior to the date of the finding of the Indictment—in this case, three years prior to September 11, 1945. As noted in the Petition for Certiorari, the Circuit Court eliminated from consideration, so far as concerns this Petitioner, all overt acts excepting the $350-check transaction which occurred in October of 1942. From this single isolated instance alone the Circuit Court found sufficient evidence upon which to base the conviction of your Petitioner. Standing alone, this transaction is more consistent with innocence than with guilt of the Petitioner. However, had it been connected by competent evidence with one of the cases or proceedings referred to in the Indictment, then a conviction based thereupon might not have been improper *if the matter had been properly presented by the Trial Judge to the Jury when he gave them his Charge.*

While it may be true as a legal proposition that the Government may prove overt acts not set out in the indictment, yet it is also true that the jury in considering the case must accept the law as stated to it by the trial judge and that it is presumed to have followed his instructions.

In *Herron v. Southern Pacific Company*, 283 U. S. 91, 51 S. C. 383, Mr. Chief Justice Hughes in writing the opinion of the court stated the law to be as follows:

> "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct *and of determining questions of law.* This discharge of the judicial function as at common law is an essential factor in the process for which the Federal Constitution provides. As was said by Mr. Justice Story, in United States v. Battiste, 2 Summn. 240, 243, Fed. Cas. No. 14,545; *'It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court.'* "

This case is followed in the later criminal case of *Quercia v. United States*, 289 U. S. 466, 53 Supreme Court Reporter 698-699.

In *Gregory v. Morris*, 96 U. S. 619, 24 L. Ed. 740, the Supreme Court decided that, "As the jury did not find contrary to the instruction, the presumption is that they followed it."

The Circuit Court adopted this same presumption as to the jury in the case at bar when referring to the instruction of the Trial Judge that the Grand Jury testimony could be used only against certain defendants. In a footnote of the Opinion, we read the following:

> "The jury apparently followed the instruction and excluded from their mind the evidence which was incompetent only as to one particular defendant (Judge Johnson) when considering his guilt or innocence."

We respectfully refer the Court to the following portions of the Charge which clearly show that the $350.00

check *was never before the jury as an overt act,* and therefore, they not only could not, but under the foregoing authorities, did not consider it as such overt act in furtherance of the alleged conspiracy.

At page R. 812a, the court charged:

"It is further alleged that the defendants and co-conspirators during the continuance of the conspiracy did commit and do overt acts to effect the object and purpose of the unlawful and felonious conspiracy, confederation, combination and agreement as to the means, manner and method of carrying out the same.

Thereafter *there are alleged forty-six separate acts claimed to have come within this classification.*

As I said before, you will have with you in your jury room the indictment, and you may refer to the document for the purpose of finding what the charge is that is made therein. In this connection the Court will caution you that neither the finding of the indictment nor the charges therein contained, though they be in positive language, furnish any proof or inference of guilt on the part of any of the defendants charged therein. The indictment is simply a statement in solemn form made by the Grand Jury of the United States against the defendants, and together with the pleas of 'Not Guilty' entered by the respective defendants, makes up the issues of fact which are to be tried in this case. To this indictment the defendants and each of them have entered pleas of 'Not Guilty'. A plea of 'Not Guilty' as to each of the respective defendants puts in issue each and every of the material allegations

of the indictments as to him. And so the issues of fact are made up fully on the proof that is brought before you by the respective parties, the United States on one hand and the respective defendants on the other."

At page R. 813a the judge instructed the jury as follows:

"Fourth, the Government must further prove beyond a reasonable doubt that the defendant under consideration did combine, conspire, confederate or agree with other persons or another person in the manner and form set out in the indictment, to commit offenses against the United States *in the manner set out in the indictment*, and that thereafter one of the defendants *did commit and do an act alleged as an overt act* to effect the objects and purposes of the conspiracy, confederation, combination and agreement, and reasonably calculated to effect the same, *in the manner and form set out and alleged in the indictment in this case.*"

At page R. 814a he charged:

"Nor is it necessary to prove that any of the overt acts were committed at the time in which they are specified in the indictment. It is sufficient if a conspiracy be found beyond a reasonable doubt that it continue in existence and force and validity for a period of time within three years of the finding of the indictment, which was the 11th day of September, 1945. If such a conspiracy be found *and an overt act as charged in the indictment* be found to have been done within three years of the finding of the indictment, that would be sufficient."

At page R. 821a, the Court charged as follows:

"In the indictment in the case at Bar *there* are *charged forty-six overt acts* as I mentioned a few minutes ago.

Some of them have been proved by the United States.

An overt act need not be an unlawful act, but it must be something done and obviously to manifest and put into effect and definitely show what was the purpose of the conspiracy. The only question with such acts which have been proven or admitted is then whether you find beyond a reasonable doubt that a *particular overt act so alleged* was done for the purpose of effecting the unlawful objects of the alleged conspiracy and was reasonably effective towards accomplishing such design.

It is not necessary for the Government to prove more than one act was done *as alleged.*"

At page R. 827a, the court charged:

"If you find there was a continuing conspiracy based upon the incidents in one of these cases and an overt act committed by one of the parties thereto, the crime would be proved even if the overt act were an incident of an entirely different and separate case, *if that fell within* the *charge of the indictment.*

It may not be proper to clarify the definition of conspiracy by making distinctions in the light of the evidence. No defendant should be convicted upon spec-

ulation or conjecture. No defendant should be convicted because he split fees, or gave part of the money which he may have earned or which may have been given to him by virtue of his official position, to another. No defendant could be convicted of an illegal, unlawful, improper or other unethical act *not charged in the indictment.*"

At page R. 863a we find the following very important portion of the charge:

> "Now, ladies and gentlemen, it will be noticed that between sometime in 1939 and November, 1941, there is considerable sag in the activities of the defendant *which are charged in the indictment,* as connected with the conspiracy and/or those which are shown in the evidence:
>
> You should give this factor serious consideration to determine whether or not there was a continuing conspiracy existing. If you find there was a conspiracy existing theretofore, ripened by an overt act *as charged,* you should still consider whether the alleged conspiracy continued in full force and vigor during this period up until after September 11, 1942, which you will remember is the critical date, *and whether there were overt acts, charged in the indictment,* committed in pursuance of the conspiracy after that date."

At the close of the Charge the attorney for Donald M. Johnson specifically requested the court to make clear to the jury their duty relative to the finding of an overt act within the statutory period and the Judge informed coun-

sel that he had charged twice on that subject and he had no intention of giving a further charge (R. 902a-903a). We might call this court's attention to the fact that if the trial judge had clarified the instruction as requested by defense counsel, there is a possibility that the $350.00 check might have been before the jury as an overt act because the clarification would have removed from prior instructions on the same subject matter the clause, "as charged in the indictment"; and similar expressions, restricting the overt acts to those specifically set forth, being the 46 overt acts alleged.

Later, after some discussion, the trial judge did give an additional Charge as to overt acts, but instead of following the form suggested by defense attorney, he told the jury as follows (R. 907a):

> "The Court also instructed that some of the acts *charged by the Government as overt acts in the indictment had been proved.* However, the Court left open and leaves open to you the question as to whether you find a conspiracy beyond a reasonable doubt and you find an act had been done by one of the conspirators adhering thereto which was done in pursuance of the criminal design and reasonably effective for that purpose. You must find that before you can find that there is an *overt act as charged in the indictment.*"

The indictment is printed at length in the Record p. 1056, and, together with the indictment in the Central Forging Case (R. 537a), taken out by the jury. At page (R. 1081) we find the heading "Overt Acts" and then follow 46 specific overt acts, in none of which is there any

reference to the $350.00 check although references are made to the alleged receipt of other sums of money by Donald M. Johnson in 1934, 1936, 1937 and 1938, all of which the Government failed to substantiate by competent evidence, nor does the Government attempt in any way to connect the $350.00 check with matters set out specifically in the 46 overt acts.

Therefore, we respectfully contend that while the trial judge did submit to the jury the matter of the alleged transaction between Abe Greenes and Donald M. Johnson as to the $350.00 check at pages 869a-870a of the Record, the submission at those two pages has to do only with the alleged general conspiracy and the credibility of Donald M. Johnson. When he instructed the jury on their absolute duty under the law, he very carefully restricted the overt acts to those charged in the indictment, and right or wrong, that was the law of the case so far as the jury were concerned, and the presumption is that they did not find the $350.00 check transaction to be an overt act in this case. Hence, the statute of limitations is a complete bar to the prosecution and conviction of this defendant, petitioner, Donald M. Johnson.

IV. ERROR OF CIRCUIT COURT IN REFUSING TO APPLY DOCTRINE OF RES ADJUDICATA OR ESTOPPEL

As urged in our Petition, Donald M. Johnson had been acquitted of a charge of conspiracy in what is known as the Central Forging Company case. At the trial his Counsel

attempted to put into evidence the entire record of that case to show the facts which had been adjudicated thus in favor of the Petitioner, but the Court refused to permit him to do so, saying that he would take care of the matter later in the case. In the Charge, the Trial Court limited the jury's consideration of this case, so far as concerns the overt acts which are the same in the Central Forging Case and in the case at bar, to the other defendants, excluding your Petitioner, *but he did not take from the jury a consideration of the facts in the Central Forging case, which we submit are the same as those introduced into evidence by the Government in this case.* On appeal, the Circuit Court found no error in the action of the Trial Judge, stating that "Donald M. Johnson is to have the benefit of the Trial Judge's instruction that nothing which occurred that was connected in any way with the Central Forging case should be determined in considering his guilt, etc." However, the Circuit Court misconstrued, we submit, the language of the Trial Judge as found at R. 888a, in which he specifically told the jury that "you shall not consider in this case as to him the overt acts which are mentioned in that Central Forging case indictment * * * In that regard you pay no attention to *those specific acts in the Central Forging Case* as regards Donald Johnson. However, all of the other matters in evidence are also as to him." The Circuit Court found (R. 1233) that the statements of law which we urged on appeal were correct, but refused to apply them to our case. We respectfully submit that in refusing to apply the admittedly correct law to the facts in our case, the Circuit Court decided the case in conflict with that law, namely, *Frank v. Mangum*, 237 U. S. 309; 35 S. C. 582;

Coffey v. United States, 116 U. S. 436, 6 S. C. 437, and similar cases, which hold that "the prior judgment of acquittal is, however, conclusive upon all questions of fact or of law distinctly put in issue and directly determined upon the trial of the former indictment", and the said decision was in conflict with its own decision in the case of *United States v. DeAngelo*, 138 F(2) 466, and in which the United States decisions above-referred to, and others, are followed as the law of the case.

V. CIRCUIT COURT'S ERROR RE THE TRIAL COURT'S REFUSAL TO DECLARE A MISTRIAL BECAUSE OF IMPROPER AND PREJUDICIAL REMARKS OF THE PROSECUTING ATTORNEY.

In his Rebuttal Argument, the Prosecuting Attorney referred to Hoyt A. Moore, a member of the New York Bar, as a "criminal conspirator". Attorney for defendants asked for the withdrawal of a juror and a continuance of the case because of this prejudicial remark of the Prosecuting Attorney (796a-797a; 806a-807a). Mr. Moore had been dismissed as a defendant in this case on Order of Judge William F. Smith, and there was absolutely no basis for the improper remark of the attorney. The name of Donald M. Johnson, your Petitioner, had been brought into the testimony in the Williamsport Wire Rope case, concerning which Mr. Moore testified, and therefore anything referring to that case affected him and would be prejudicial to him. The Circuit Court of Appeals dismissed this action of the Trial Judge as "irrelevant entertainment for the jury",

after referring to the remarks of defendant's counsel that Mr. Moore was a man of fine qualities, an example of an honest man, and a good fellow and a fine old gentleman.

The word "criminal" is not applied to an innocent man. In the case of *Van Riper v. Constitutional Government League* (Washington Supreme Court), 96 P. 2d 588, 125 A. L. R. 1100, after giving the several definitions of the word "criminal" as taken from the standard dictionaries, the court says "we quote these standard lexicons because they give not only the technical but also the popular meaning of the word 'criminal'. In consulting such works the layman would receive the impression, if he did not already have it, that the term 'criminal' implies a wicked or heinous act."

In *New York Life Insurance Co. v. Doerksen*, 75 F (2) 96 (CCA 10), the counsel for the plaintiff referred to an important witness who performed the autopsy as a "butcher". The court struck out the remark but the appellate court considered that such action was not sufficient on the part of the Trial Judge. In the course of the Opinion, the court called attention to the case of *New York Central Railway v. Johnson*, 279 U. S. 310, 49 S. C. 300, where a judgment was reversed solely because of inflammatory remarks of counsel. Mr. Moore was a very important witness on behalf of the defendants and characterizing him as a "criminal conspirator" could not be but highly prejudicial to them.

VI. THE DECISION OF THE CIRCUIT COURT RELATIVE TO THE EFFECT OF CHARACTER EVIDENCE IS IN CONFLICT WITH EDGINGTON v. UNITED STATES

The Circuit Court held in this case that the Charge of the Court Below was proper concerning character evidence. The entire decision of the Circuit Court on this subject reads as follows (R. 1230):

> "1. Several of the appellants complain about the charge of the Trial Judge concerning character evidence. On this point the Judge charged as follows: 'The evidence of the good reputation of a defendant for honesty and being a law-abiding citizen is admissible in this case. It is substantive evidence and is entitled to weight in your determination. The Government is bound to prove the charge as against any defendant beyond a reasonable doubt, based on all the evidence. If you find that the charge has so been proved as against any defendant, giving weight to the substantive evidence of good reputation, you may find him guilty.
>
> 'In this connection, you may consider that persons who may have the best reputations in their communities have heretofore been known to have committed crime. While, therefore, it is your duty to weigh and consider such evidence, you are not bound to find the defendant innocent simply because he possessed a good reputation before indictment. If after considering all the evidence, including the evidence of good reputation,

there is reasonable doubt as to the guilt of the defendant existing in your minds, you may acquit him.'

"We think this charge was correct and within the decision of this Court in United States v. Quick, 128 F. 2d 832 (C.C.A. 3, 1942) and the later reiteration of the doctrine of that case in United States v. Frischling, 160 F. 2d 370 (C.C.A. 3, 1947)."

It will be noted that the Court states that the Charge as given was correct and within the decisions of its own court in *United States v. Quick* and *United States v. Frischling*. Our complaint is that the Charge is not in accordance with the decision of the United States Supreme Court in *Edgington v. United States*, 164 U. S. 361, 17 S. C. 72.

Donald M. Johnson, your Petitioner, is a former District Attorney, and has been engaged in the practice of law in the Middle District of Pennsylvania since March, 1929, when he was admitted to the Bar (R. 664a). The following witnesses testified as to the good character or reputation of Donald M. Johnson, your Petitioner:

Dr. Friedman Cathrall, Physician, Scranton, Pa. (575a, 576a).

Judge A. Francis Gilbert, Judge of the Common Pleas Court of Union and Snyder Counties, who had appointed Donald Johnson as District Attorney at one time (725a).

Frank A. Attinger, Snyder County Superintendent of Schools (727a).

Horace W. Vought, District Attorney of Snyder County (728a).

Reverend H. D. Snyder (730a).

Elmer E. Dinius, Sheriff of Snyder County (732a).

Evan B. Hassinger, Prothonotary of Snyder County (733).

These several witnesses testified that the general reputation of Donald M. Johnson for honesty and for being law-abiding was "excellent" (Dr. Cathrall); "very good" (Judge Gilbert); "excellent" (Mr. Attinger); "very good" (District Attorney Vought); "very good" (Reverend Snyder); "very good" (Sheriff Dinius); and "very good" (Prothonotary Hassinger).

It is very important to note that although Donald M. Johnson put his good character and reputation in evidence by producing the foregoing witnesses, the Government wholly failed either to impeach these witnesses or produce contradictory testimony.

We quote the following from the Opinion in the *Edgington Case* which reversed the Lower Court, stating:

> "Whatever may have been said in some of the earlier cases, to the effect that evidence of good character of the defendant is not to be considered unless the other evidence leaves the mind in doubt, the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. *The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt*, although, without it, the other evidence would be convincing."

And in the case of *Sunderland v. United States,* 19 F. 2d 202, 215 (CCA 8) it was held that although a defendant may not require a charge in the exact words of the Edgington case, he is entitled to a charge which comports with the rule of that case by instructions which set forth (1) *the purpose and function of character evidence, i.e., to generate a reasonable doubt;* (2) the probative status of such evidence, i.e., that it be considered by the jury regardless of whether the other evidence in the case is clear or doubtful, and (3) the possible effect of character evidence, i.e., that when considered along with the other evidence in the case, if a reasonable doubt exists as to the defendant's guilt, he is entitled to an acquittal.

In our case, it is important to note that nowhere does the Charge tell the jury that the purpose and function of character evidence is to generate a reasonable doubt. In *Miller v. United States,* 120 F 2d 968, (CCA 10), following the Edgington case, the Circuit Court found that the instruction given was too narrow, saying "It does not tell the jury that character testimony may be such that it alone may create a reasonable doubt, although without it the other evidence would be convincing."

At page 904a of the Record in our case, we find that the attorney for the defendant took a specific exception to the portion of the Charge quoted in the Opinion of the Circuit Court as above noted. It was and is the position of your Petitioner that the very meager instruction given on this subject, all of which is set forth in the quotation from the Circuit Court's Opinion above-referred to, excepting a final statement that the Judge called attention to the fact that he had limited the number of character witnesses in order

to save time, and that they should consider that the defendants might each have called many more character witnesses if the court had not taken such action. We respectfully submit that the Charge on this point was not only inadequate but that it falls far short of what a Trial Judge is required to instruct the jury in accordance with the law as laid down by the United States Supreme Court.

In *Mannix v. United States*, 140 F 2d 250, the Circuit Court for the Fourth Circuit sets forth, at page 253, the divergence of opinion in the several circuits as to the interpretation of the Edgington case. In referring to the courts of the second, third, which is our circuit, fifth, eighth, and ninth, the Judge states that it has now been decided in these circuits that it is proper for the court to instruct the jury as to the value and weight of reputation of good character. We respectfully submit that such instruction was entirely omitted in our case.

VII. ERROR OF CIRCUIT COURT IN AFFIRMING TRIAL JUDGE'S CHARGE RELATIVE TO BEGINNING AND ENDING OF CONSPIRACY AND IN TAKING FACTS FROM JURY

Nowhere in the Charge of the Court did it appear that the Trial Judge charged the jury that they must find the date of the beginning of the alleged conspiracy and the date of its end. We respectfully submit that the action of the Circuit Court in affirming the Judge's Charge overlooks the fact that in an alleged conspiracy involving so many

persons it is important to know the date of the beginning and the end of the same, because it is the law that a particular defendant cannot be found to have any connection with the conspiracy unless it is formed prior to his becoming a member thereof, and by the same token, if a conspiracy was completely ended, no action of defendant would make him a party thereto at that late date. The Government in our case has wholly failed to prove an agreement among any of the defendants, but relied solely upon the inferences to be drawn from the activities in the various cases of one or more of the defendants. Let us take, for example, the matter of the Williamsport Wire Rope case, the last act which was in December of 1938. Obviously, if a general conspiracy had been formed in 1940, no action of any person connected therewith prior to the date of the formation of the conspiracy would be admissible or could be considered as overt acts because they would not be in pursuance of the conspiracy. The same is true as to the termination of the general conspiracy if any.

In his Charge at 821a the Judge said "In the Indictment in the case at bar there are charged 46 overt acts, as I mentioned a few minutes ago. Some of them have been proven by the United States." Whether or not a fact has been proven is for the jury and not for the court. In *Marrach v. United States*, 168 Fed. 225 (CCA 2), the general proposition is stated thus at page 229:

> "We are convinced that the questions, whether a conspiracy existed as charged in the indictment, and whether an act was done by one or more of the defendants to effect the object of conspiracy were clearly questions of fact for the jury."

In *United States v. Olmstead,* 5 F 2d 712, it is said "Whether the alleged overt act is such is a question of fact for the jury". In *United States v. Murdock,* 299 U. S. 389, 54 S. C. 223, it is said at page 225:

> "A federal judge may analyze the evidence, comment upon it, and express his views with regard to the testimony of witnesses. He may advise the jury in respect of the facts, but the decision of issues of fact must be fairly left to the jury. Patton v. United States, 281 U. S. 276, 288, 50 S. Ct. 253, 74 L. Ed. 854, 70 A. L. R. 263; Quercia v. United States, 289 U. S. 466, 53 S. Ct. 698, 77 L. Ed. 1321."

It is respectfully submitted that for the reasons hereinbefore set forth, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,
CHARLES J. MARGIOTTI,
Attorney for Petitioner.

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CITATIONS

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No. 459

DONALD M. JOHNSON, PETITIONER

v.

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No. 460

JACOB GREENES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court denying motions for judgments of acquittal notwithstanding the verdicts (R. 925–937)[1] is not reported. The

[1] "R." is used herein to refer to the printed record filed pursuant to stipulation (R. 1239–1240). The designation "Tr." will be used to refer to the typewritten transcript filed with this Court, reference to which may be made by any party hereto under the terms of the stipulation.

opinion of the circuit court of appeals (R. 1223–1234) is not yet reported.

JURISDICTION

The judgments of the circuit court of appeals were entered August 21, 1947 (R. 1235–1236), and petitions for rehearing were denied September 29 (Johnson) and October 3 (Greenes) (R. 1236, 1237). On October 24, 1947, by order of Mr. Justice Burton, Johnson's time for filing a petition for a writ of certiorari was extended to November 28, 1947 (R. 1237), and on October 28, 1947, also by order of Mr. Justice Burton, Greenes was granted a like extension to December 2, 1947 (R. 1238). Both petitions for writs of certiorari were filed November 28, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence sufficiently established a general, over-all conspiracy to obstruct justice as charged, and not merely a number of separate, disconnected conspiracies having no common figure.

2. Whether the evidence is sufficient to sustain the verdict as to petitioner Johnson.

3. Whether an overt act within the limitations period was proved.

4. Whether the trial judge correctly applied the doctrine of collateral estoppel in his instructions to the jury concerning the effect of petitioner Johnson's prior acquittal, of defrauding and conspiracy to defraud the bankrupt estate of the Central Forging Company, on their consideration of the evidence adduced against him in the instant case.

5. Whether a mistrial should have been declared because the prosecutor, in his rebuttal argument to the jury, called a defense witness a "criminal conspirator."

6. Whether the instructions concerning the weight that might be accorded to evidence of good character were correct.

7. Whether the jury were sufficiently cautioned that evidence of improper acts or of conspiracies other than the one charged would not justify verdicts of guilty.

8. Whether the trial judge invaded the province of the jury by telling them that some of the overt acts alleged had been proved, the context clearly indicating that by overt acts he meant acts in the objective sense, disassociated from their possible sinister character as having been done in furtherance of the objects of the conspiracy.

9. Whether it was proper to permit the Government to introduce in evidence the admissions against interest made by petitioner Greenes be-

fore the grand jury on two successive days, without also requiring that all his other statements before that body be introduced.

STATUTE INVOLVED

Section 135 of the Criminal Code (18 U. S. C. 241) provided in pertinent part during the period of the alleged conspiracy (February 1934 to December 1944):[2]

> Whoever corruptly * * * shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede * * * the due administration of justice [in any court of the United States] shall be fined not more than $1,000, or imprisoned not more than one year, or both.

STATEMENT

On September 11, 1945 (R. 1), an indictment (R. 1056–1086) was filed in the District Court for the Middle District of Pennsylvania charging that from February 1934 to December 1944 petitioners and eight other defendants—Albert Johnson, Miller Johnson, Albert Johnson, Jr., John Memolo, Hoyt Moore, Joseph Jennings, Charles Korman, and David Schwartz—conspired with one another and with other named persons, in violation of Section 37 of the Criminal Code (18 U. S. C. 88), to obstruct the administration

[2] The Act of June 8, 1945, c. 178, § 1, 59 Stat. 234, amended this section by increasing the maximum fine to $5,000 and the maximum term of imprisonment to five years (see 18 U. S. C., Supp. V, 241).

of justice in divers judicial proceedings pending in the District Court for the Middle District of Pennsylvania, in violation of Section 135 of the Criminal Code, *supra,* and to defraud the United States of and concerning its governmental function of having such proceedings considered and disposed of by that court in accordance with law and justice and, more particularly, of and concerning its right to the honest and faithful judicial services of the defendant Albert Johnson, as senior judge of that court, in such proceedings (R. 1057–1058). The indictment described, by names, docket numbers, and brief descriptions of their subject matters, eleven specific court proceedings allegedly affected by the conspiracy charged (R. 1059–1067). Forty-six overt acts were alleged (R. 1081–1086).[3]

Following a trial by jury petitioners and the defendants Miller Johnson and Memolo were found guilty (R. 920, 1218; Tr. 3966) and each was sentenced to imprisonment for two years and to a fine of $10,000 (R. 941, 942, 1219; Tr. 3977).[4] On appeal, the convictions of petitioners

[3] The indictment also set out in detail the manner in which the conspiracy was allegedly carried out (see R. 1067–1080).

[4] Judge Johnson and Albert Johnson, Jr., were acquitted (Tr. 3968). The indictment was dismissed as to Moore and Korman on their plea of the statute of limitations (Moore: *United States* v. *Johnson*, 65 F. Supp. 42; Korman: *United States* v. *Johnson*, 65 F. Supp. 46), and abated as to Jennings, who died subsequent to its return (see R. 1224). Schwartz was granted a severance because of illness (see *ibid.*).

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and Memolo were affirmed (R. 1235–1236), that of Miller Johnson being reversed on the ground of insufficiency of the evidence to sustain it (R. 1228–1230).

In view of the nature of the case, the complexity of the conspiracy involved and the numerous lawsuits around which it revolved, it is necessary to set forth at greater length than seems desirable the evidence supporting the convictions. The italicized headings in the following summary denote the names of the eleven court proceedings allegedly affected by the conspiracy, the evidence grouped under each such heading relating to that particular proceeding. Other evidence, not relating to any particular one of the eleven proceedings, is set forth under the heading "Additional Evidence." Some of the evidence consists of admissions against interest made by petitioner Greenes before the grand jury, which were admitted as against him alone (R. 1104; see R. 885). Such evidence is set forth below in brackets. Petitioner Donald Johnson and Miller Johnson are the sons of former Judge Johnson. Memolo, a local attorney, and petitioner Greenes worked with them, according to the Government's evidence, in selling Judge Johnson's judicial favors. The only other qualifying observations that need be made relate to the evidence in the *Central Forging Company* case, *infra,* pp. 30–34, at which point in the Statement the necessary explanatory facts are stated in marginal notes.

MOUNT JESSUP COAL COMPANY CASE

This was a bankruptcy proceeding which arose in 1925 (Ex. G–3, Tr. 348). In 1928 one Simoncelli, tax collector of the Borough of Winton, by his attorney, the defendant Memolo, filed a tax claim of $12,747.14 against the bankrupt (Ex. G–9, Tr. 357, 504–506). Claims for taxes were also filed by the Commonwealth of Pennsylvania and the United States (Exs. G–6, G–7, Tr. 353, 355). Patrick Kilcullen, who had been named special master by Judge Johnson to determine the respective priorities of these claims (Ex. G–10, Tr. 358, 507), first ruled that the Winton claim had priority over the others (Ex. G–11, Tr. 349–360, 507–513). At the instance of the United States, Judge Johnson ordered Kilcullen to reconsider this finding (Ex. G–12, Tr. 361, 514) and in February 1934 Kilcullen filed a second report, in which, reversing his original finding, he ruled that the claims of Pennsylvania and the United States had priority (Ex. G–13, Tr. 362, 514–518). On behalf of Simoncelli, Memolo excepted to this second report (Ex. G–14, Tr. 363, 518–519) and in July 1934 Judge Johnson reversed Kilcullen's second decision and reinstated his original finding in favor of the Borough of Winton (Ex. G–15, Tr. 365, 519–526, 539–547). Accordingly Judge Johnson ordered payment to Simoncelli of $20,496.10, the basic claim plus interest and penalties; he modified this order a few days later, directing payment of the basic claim immediately but sus-

pending payment of the interest and penalties until later (Ex. G–16, Tr. 366, 548–552).

Simoncelli testified that quite some time after he filed his tax claim Memolo told him that he would keep 50% of whatever money he recovered for Simoncelli (R. 13–15). He eventually received two checks from Memolo, the second being accompanied by a statement explaining the distribution of the money recovered (R. 15–17). This statement indicated that in November 1934 a check for $12,747.14 (the basic claim) was received by Memolo, of which amount exactly half was retained by Memolo as "Expenses paid," the other half being paid to Simoncelli; that in the following month a second check, for $7,748.96 (interest and penalties), was received by Memolo, of which amount exactly half was retained by Memolo as "Expenses paid"; and that from the other half, typing and notary expenses and Memolo's fee of $500 were deducted, the balance being paid to Simoncelli (Ex. G–97, R. 19, 21–22).

[Petitioner Greenes admitted before the grand jury that Kilcullen told him one day that he had a case in which "Mr. Memolo was interested" and which he thought "presented the possibilities of some fees" and that Greenes should "see Mr. Memolo about it" (R. 1105–1106, 1116). Kilcullen also told Greenes that he "was going to try to help Donald [Johnson] financially" (R. 1114). Greenes accordingly told Memolo to get in touch with Kilcullen, who would "act on the case favor-

ably or have the case worked on favorably for him" (R. 1116). Memolo thereafter dealt with Kilcullen directly (R. 1109, 1116). When Memolo received the money recovered on behalf of Simoncelli, he gave Greenes about $5,000 with directions to give it to Kilcullen (R. 1107, 1111). Greenes took $1,000 to reimburse himself for a loan he had made to Donald Johnson (R. 1109–1110) and tendered the balance to Kilcullen, but the latter directed Greenes to give it to Donald Johnson, who just then made an appearance (R. 1107, 1109, 1115). Greenes did so, stating that "it was the proceeds of the Mt. Jessup coal thing" (R. 1107, 1110).]

PENNSYLVANIA CENTRAL BREWING COMPANY CASE

This was a reorganization case which arose in 1934 (Ex. G–18, Tr. 374). Memolo was a trustee in the proceeding (R. 32–33).

Edward Maloney, an accountant, testified that he agreed with Greenes in 1939 to "go fifty-fifty" with him if Greenes would get him an appointment as auditor in this case. He thereafter received such an appointment. (R. 50–52.) Maloney worked for three months, and would not "ordinarily" have charged in excess of $1,500 for his services (R. 60–61, 100–101). He charged $4,973, receiving two checks for $2,500 and $2,473 on the orders of Judge Johnson (Exs. G–21, G–22, Tr. 377–378). Memolo told him how much to charge, and in fact prepared both his petitions

for fees (R. 52–54, 58). Maloney gave Greenes 50% of both payments pursuant to their agreement (R. 54–55, 59).

[Greenes admitted asking Donald Johnson, at Memolo's request, to arrange for Memolo's appointment as trustee. Memolo agreed to "play ball," i. e., "divide his fees," and Donald was satisfied that he would since he "did all right on his commitment" in the *Mount Jessup* case. At Donald's suggestion, Memolo asked Judge Johnson for the appointment and received it. (R. 1117–1118.) Memolo's first fee was $3,500. He gave Greenes half to give to Donald Johnson, which Greenes did, receiving $100 or $150 as his share. (R. 1118–1119.) Memolo received his second fee, $1,500, in 1943. Greenes went to get the 50% called for by the agreement, but Memolo refused to split this fee. The incident resulted in a fight between them, Memolo bodily ejecting Greenes from his office. (R. 1154–1157.) Greenes also admitted making the arrangements with Donald Johnson for Maloney's appointment in this case and giving Donald half of Maloney's fees, less "a couple of hundred dollars" for himself (R. 1120–1122).]

WILLIAMSPORT WIRE ROPE COMPANY CASE

In 1932 the Williamsport Wire Rope Company went into friendly receivership. Robert Gilmore and Charles Ballard were the receivers, and Oliver Decker their counsel. (Exs. G–53, G–54,

G–55, G–56 [p. 1], Tr. 438–442.) The receivers' fees were fixed at $1,000 a month each, and Decker's at $500 a month (Ex. G–56 [p. 2], Tr. 442).

In 1934 Judge Johnson appointed Delmar Townsend, an old acquaintance of the Johnsons, coreceiver at the same compensation as the others (R. 386–389; Ex. G–56, Tr. 442). Prior to the receivership Gilmore had been president of the Williamsport Company at a salary of $40,000 a year plus expenses. Ballard had been vice-president in charge of sales at $25,000 a year plus expenses. Both these men continued to do the same kind of work as receivers as they had previously done as officers of the company. (R. 401–402, 433.) Prior to his appointment as receiver, Townsend had been general manager of a 45-mile-long railroad at a salary of $3,000 a year, which he had been receiving since 1917 (R. 385, 416, 454–455). Townsend continued to hold his job with, and draw his salary from, the railroad throughout the more than three years of his term as receiver (R. 398, 455). Following Townsend's appointment, Miller Johnson asked him to give Albert Johnson, Jr. 50% of his fees in order to help Albert, Jr. and Donald Johnson pay "some obligations" they had. Townsend agreed to do so, and for the remaining three years of his term as receiver gave Albert Jr. half of his fees, less his tax thereon. (R. 391–398, 426.)

In 1935 Judge Johnson appointed Memolo co-counsel to the receivers at $500 a month on account, the same amount Decker, the original counsel, was receiving. The order of appointment stated that it was issued "after consultation with the Receivers and their Counsel and with their approval." (Ex. G-60, Tr. 446, 1527–1528.) Townsend testified that he had no knowledge that Judge Johnson contemplated appointing another attorney until he received the order (R. 390–391). Townsend also testified that prior to Memolo's appointment the receivers would confer with Decker whenever they needed legal advice, but that such need did not arise especially frequently (R. 391). Following Memolo's appointment Judge Johnson told the receivers and Decker that the reason why he had appointed a second attorney was that he had not been able to get desired information from Decker, but Decker protested that he recalled no such occasion. The receivers "knew nothing about that," according to Townsend. (R. 442–443.)

In August 1935 Judge Johnson increased the compensations of the attorneys to $1,000 a month (Ex. G–61, Tr. 447). Townsend first learned of the increases when the order was issued (R. 399–400). Gilmore and Ballard were dissatisfied on learning that their counsel were to receive the same compensation as they (R. 429). Townsend, therefore, told Judge Johnson that in his opinion Gilmore and Ballard, who were devoting their

entire time to the receivership, should receive more than the attorneys, but that he himself wanted no increase, as he was entirely satisfied with the amount he was getting. Judge Johnson agreed with Townsend, except that he said he would not increase the fees of "just two of the receivers." (R. 400–401.) Accordingly, in September 1935, the compensations of all three receivers were raised to $1,500 a month on account (Ex. G–62, Tr. 448.) Townsend's 50% contributions to Albert Johnson, Jr. thereafter reflected his increase (R. 403).

From the beginning the receivership was extremely successful, and Judge Johnson on numerous occasions so stated (Ex. G–56, Tr. 442; Ex. G–62, Tr. 448; Ex. G–63, Tr. 449, 1552–1553; R. 405–406; Tr. 1609–1618). At a hearing on the conduct of the receivership in January 1936 receiver Gilmore traced the steady and substantial increases in gross sales, net profits, and cash accumulations. He stated that the demand for wire rope was increasing and that the company had a greater accumulation of unfilled orders than at any time since 1930. He further stated that, based on past experience and anticipated sales, the entire indebtedness of the company, including all unpaid interest on its outstanding bonds, and excluding only the principal, could be "wiped out" and the company restored to its stockholders within two years. (Tr. 1609–1618.) On several occasions, also, Judge Johnson stated that the

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stockholders had a clear equity in the company and that any plan of reorganization which did not take this equity into account would be unacceptable (Ex. G–59 [p. 2], Tr. 445, 2241; Tr. 1663–1665).

The principal creditor of the Williamsport Company was the Bethlehem Steel Company, which had become such by virtue of having bought up most of its outstanding bonds at 70¢ on the dollar and most of its unsecured obligations at 43¢ on the dollar (Tr. 1660–1661, 2332–2333, 2345). Bethlehem had made an "offer for the whole plant" (Tr. 1660–1661), but Judge Johnson, at the January 1936 hearing said that, since "this Bethlehem offer offers nothing to the preferred stockholders," it should be rejected (Tr. 1663–1665).

Hoyt Moore, senior partner in a New York law firm, was Bethlehem's general counsel (R. 589–590, Tr. 2518–2519), and Harry Mumford, a Scranton attorney, was Bethlehem's local counsel in connection with the Williamsport receivership (R. 467). In the summer of 1936 Memolo asked Mumford if he knew what Bethlehem's "objective" was in respect of the Williamsport Company. At this time, according to Mumford, the affairs of the receivership were "very quiescent." When Mumford told Memolo he did not know, Memolo asked him to arrange an appointment for him with Robert McMath, Bethlehem's financial vice-president, explaining that, "as attorney for

the receivers," he might be able to work out something mutually advantageous. Mumford arranged the appointment. (R. 469–470, 581.) Memolo, however, "got nowheres" with McMath, who was "rather cagey" (R. 471), so he asked Mumford to arrange an appointment for him with Moore, who he thought would be "more frank" in disclosing "what Bethlehem wanted" (R. 473–474). Memolo remarked that the receivership was a "large" one and "could stand quite a lot of money." He also said that "the boys wanted to make a killing." (R. 474.) He mentioned in this connection the sum of "something like" $200,000 (R. 475).

In the fall of 1936, accordingly, Mumford advised Moore that Memolo would like to see him and that he "was talking in * * * large sums of money." Mumford expressed "astonishment" to Moore "at the amount, and what was involved." Moore told Mumford that he, Moore, was the proper person to be astonished, that he "was in the saddle," and that he would like to see Memolo. (R. 476, 961.) A meeting was accordingly arranged and Mumford attended it himself (R. 947). Thereafter Moore, Memolo, and Mumford conferred and worked together "getting papers ready" many times at the Moore firm (R. 949). Mumford never saw any of the Williamsport receivers there, however, nor Decker, the other attorney for the receivers (Tr. 1811–1812). On one occasion Memolo told Mumford that

"Don" was with him in a car, that "Don thought he would get some money" on that occasion, but that he "was going to be disappointed" (R. 478).

On September 14, 1936, Bethlehem instituted foreclosure proceedings against Williamsport (Ex. G–65, Tr. 452–453), and on May 27, 1937, purchased the Williamsport Company at a foreclosure sale (Tr. 2329). During this 8½-month interval extensive foreclosure litigation was conducted [48] and, according to the admissions of Moore, a defense witness, numerous conferences were held between him and Memolo, at which they discussed many questions relating to what Bethlehem's tactics in the foreclosure proceeding should be (Tr. 2532–2533, 2538, 2544–2548, 2554, 2559–2561, 2580–2586, 2588, 2590–2591, 2594–2595).

Also during this 8½-month interval Memolo and Donald Johnson conferred with Judge John-

[48] The receivers resisted Bethlehem's petition to make them parties defendant in the foreclosure proceedings (Ex. G–67, Tr. 454); Judge Johnson granted leave to Bethlehem to join the receivers as parties defendant (Ex. DJ–48, Tr. 2320, 2321–2322); the bill of foreclosure was filed (Ex. G–69, Tr. 456); the receivers filed an answer to the bill (Ex. G–70, Tr. 457); separate answers were filed by certain stockholders (Exs. DJ–53, DJ–54, Tr. 2441, 2443); Bethlehem filed motions to strike portions of the answers (Exs. DJ–55, DJ–56, Tr. 2444); the motions to strike were granted by Judge Johnson (Ex. G–73, Tr. 460); a foreclosure decree was entered (Ex. G–74, Tr. 461–462); a stockholders' petition to modify the foreclosure decree was filed and dismissed (Ex. DJ–60, Tr. 2447; Ex. G–76, Tr. 463); and exceptions to the decree were filed by certain stockholders and dismissed (Ex. DJ–62, Tr. 2448; Ex. G–76, Tr. 463).

son in the latter's chambers on several occasions (R. 156, 158, 159). On one of these occasions Memolo "had the proposed foreclosure decree" with him, and Judge Johnson asked his law clerk, Albert Houck, to "go over" it with Memolo (R. 157). Houck testified that, while there was not "anything unusual about an attorney preparing a decree for a Court's consideration" (R. 197), it was "unusual" for an attorney who represented the defendants in a proceeding to prepare a decree on behalf of the plaintiff (R. 219). On another of these occasions Albert Johnson, Jr. was also present, the conference being a "secret" one (R. 159, 212). Houck heard all the participants at the conference whispering (R. 210–211). From time to time Donald or Albert, Jr. would open the door to Houck's office to see whether he was at his desk and whether he was listening (R. 206–207, 208, 209–210, 260–261). Several times Memolo and Donald asked Houck questions about the *Williamsport* case (R. 159, 211). Donald and Albert, Jr. asked Houck whether the duties of John Taylor, whom Judge Johnson had named as special master to conduct the foreclosure sale, included "distribution of * * * the sale price." Houck said yes and referred them to the decree so providing. (R. 160–161, 212.) Neither Donald nor Albert, Jr. was an attorney of record in the *Williamsport* case (R. 148, 218).

On May 17, 1937, ten days before the sale, Donald Johnson telephoned Houck and instructed him not to file his father's opinion in the *Williamsport* case "until the boss said so" (R. 161).

At the foreclosure sale Bethlehem Steel purchased the Williamsport Company as a going concern for $3,300,000, the only bid made (Tr. 2329). Included among the purchased assets was over $1,000,000 in cash (Tr. 2347–2348). At the time of the sale Bethlehem owned 95% of the outstanding bonds of Williamsport, or approximately $1,200,000 (Tr. 2332–2333), which it had previously bought up at 70¢ on the dollar (Tr. 2345). The face value of these bonds, plus accrued interest, was credited against the purchase price bid (Tr. 2346).

On July 26, 1937, following the sale, Memolo told Houck to tell Judge Johnson to file his final decree confirming the sale immediately in order to "forestall" certain Williamsport stockholders, who were about to petition the circuit court of appeals for a writ of prohibition restraining him from so doing. Memolo "practically told [Houck] what the Court should do," which Houck thought "was carrying it a little too far," so he told Memolo he should take the matter up with Judge Johnson, not with him. (R. 162, 200.) The following morning, July 27, Judge Johnson and Donald both discussed the proposed final decree with Houck. The Judge then called Memolo to

make sure the decree was "all right," and it was filed. No accompanying opinion was handed down at this time, as it was not ready for filing. The opinion was filed subsequently. Judge Johnson's usual procedure was to file his decrees and accompanying opinions simultaneously. This was the first time since Houck had been associated with him that this practice had been varied. (R. 162–164.)

On August 2, 1937, Donald Johnson, Memolo, and Judge Johnson had another "very secret" conference (R. 164, 205, 209) and on August 13 Judge Johnson appointed John Crolly special master and auditor in the case (Ex. G–84, Tr. 472; R. 165–166). Houck pointed out to Judge Johnson that "John Taylor had already been appointed Special Master and that this was apparently a duplication or conflict with the other order." Judge Johnson replied that "it was all right" because "Bethlehem has agreed to pay those expenses and it won't hurt Taylor's fee." (R. 166, 213–214.)

On September 4, 1937, Judge Johnson appointed Martin Memolo, brother of the defendant Memolo (Tr. 2601), "agent of this Court, to supervise and oversee" the Williamsport properties pending appeal from the order confirming the sale (Ex. G–85, Tr. 473).

On July 9, 1938, special master Crolly filed an order appointing Edward Maloney to audit the

accounts of the receivership. It was, however, antedated August 20, 1937. (Ex. G–92, Tr. 479; R. 70, 71.) The "order of John W. Crolly * * * of August 20, 1937" was "confirmed and approved" by Judge Johnson on July 9, 1938 (Ex. G–93, Tr. 480; R. 71).

By the terms of the foreclosure decree, the purchaser was required to pay "all administration expenses" as well as all unpaid compensation of the receivers and their attorneys (Tr. 1766–1769). Whereas the receivers and Decker received from Bethlehem final compensation in the amount of $5,000 each (R. 950), Crolly's final fee was $30,850.01 (Ex. G–119, Tr. 1822), Martin Memolo's was $66,990 (Exs. G–124, G–125, G–126, G–127, G–128, Tr. 1823–1824), Maloney's was $31,075 (Ex. G–118, Tr. 1822), and the defendant Memolo's was $81,084.99 (Exs. G–121, G–122, G–123, Tr. 1822–1823). Crolly's and Maloney's bills for services were delivered to Moore by the defendant Memolo (R. 1035). While the $5,000 checks of the receivers and Decker were delivered to them by Mumford, Bethlehem's local counsel (R. 950), the checks of Crolly, Martin Memolo, and Maloney were sent by Moore to the defendant Memolo (Tr. 2742–2743). Moore admitted telling Memolo that he did not care how much Crolly, Martin Memolo, Maloney, and he billed Bethlehem for so long as the aggregate did not exceed

$250,000 (R. 1032–1033). Moore also instructed Memolo as to what form the bills of Crolly, Martin Memolo, and Maloney should be in (R. 1034–1035). At Moore's request Memolo approved the bills of Crolly, Martin Memolo, and Maloney by writing "O. K. J. M." on slips of paper attached to the bills (R. 1036–1037; Tr. 2628–2630; Exs. DJ–97, DJ–95, DJ–99, Tr. 2634–2635), but Moore did not ask Memolo to "O. K." the final fees of the receivers and Decker (Tr. 2744).

Mumford testified that Moore consulted him concerning the fees of the receivers and Decker, but not concerning anybody else's (R. 949–951). Moore did tell Mumford once, however, that he and Memolo were having difficulty concerning "the method of payment" of "the fees." Memolo "wanted his in cash," but was told that "it couldn't be done that way" because, since Bethlehem "was a corporation," the fee "would have to be paid by check." (R. 951.) Moore further explained to Mumford that he "didn't want to be blackmailed by Mr. Memolo at a later date" (R. 957).

Maloney testified that in June 1938 Memolo told him he would recommend him for the job of auditing the receivership accounts, and that he received the appointment a few days later, in July (R. 63, 68–69). After he worked a few months

Memolo told him to bill Bethlehem for $31,075 and "to sort of distribute it from, say, dating back to 1937." Maloney did so, "alleging services rendered in 1937," though he had not been appointed until July 1938. He gave the bill to Memolo. (R. 64–66.) Thereafter Memolo called Maloney to tell him his check had arrived. Maloney endorsed it and gave it to Memolo. Memolo asked him how much he would "ordinarily" charge for his work. Maloney said around $900 or $1,000. Memolo gave him $1,200, plus $3,900 to cover his income tax on the whole amount. (R. 66–68, 74.)

[Greenes admitted recommending Memolo to Donald Johnson as "additional counsel" to the receivers after Memolo agreed to "play ball" (R. 1124–1125). Memolo paid Greenes half of his fees for delivery to Donald, sometimes borrowing money in order to make "advances" and using Donald's 50% to pay off the loans (R. 1125–1129, 1154, 1169). Later "Memolo conceived the idea of making a deal with Bethlehem to acquire the entire works." Memolo told Greenes only the broad outlines of the plan, but discussed it in detail with Donald. Greenes' understanding was that Bethlehem was "willing to spend" $150,000 as "fees" for acquiring the Williamsport Company—$25,000 to be paid "on the record" to the three receivers and their two counsel and the balance to go to Memolo "off the record." (R.

1130, 1137, 1140.) Greenes, Donald, and Memolo drove to New York once to "sew this thing up." After Memolo left Moore's office, they went to see Judge Johnson in a New York hotel, where Memolo and Donald conferred with him privately. (R. 1139–1140.) According to the plan as Greenes understood it, the fees of Crolly, Martin Memolo, and Maloney were "to be turned back to" the defendant Memolo (R. 1140–1141, 1149). Martin Memolo received an advance fee of $25,000, following which Greenes went to the defendant Memolo to collect part of it, but was told to "wait until it is all in the pot." Greenes complained to Martin that "John wasn't doing as he agreed to do," but Martin told him that he himself had given $6,000 of the money to Donald, which Donald confirmed (R. 1141–1143). After the "off-the-record" money had been all paid, Memolo "kept stalling," pretending he had not received it (R. 1141, 1147–1150). A year after the case was over, Judge Johnson told Greenes that Memolo "had treated Donald very shabbily" and was a "crook" (R. 1145–1146). Greenes kept dunning Memolo for a long time for his share of the money, but in 1943 despaired of ever receiving it (R. 1150–1152).]

CONTINENTAL CIGAR CORPORATION CASE

This was a reorganization proceeding which arose in 1935. Judge Johnson appointed John Crolly a trustee. (Ex. G–24, Tr. 385–386.)

Thereafter he appointed Memolo counsel to the trustees (Ex. G–26, Tr. 387, 764–765).

[Greenes admitted that Memolo gave him half of his $1,000 fee in this case, and that he delivered it to Donald Johnson, receiving about $50 for himself (R. 1172–1173).]

KORMAN CASE

In May 1935 one Korman and 62 others were indicted for conspiracy to violate the internal revenue laws (Tr. 1097–1099, 1104). When the case was tried in November 1935 before District Judge Welsh, Korman had not yet been apprehended (Tr. 1098). Most of Korman's codefendants pleaded guilty (Tr. 1099), and all except a very few received executed jail sentences (Tr. 1105, 1110). Korman subsequently pleaded guilty before Judge Johnson in May 1936 (Tr. 1100, 1106). Judge Johnson asked Memolo, Korman's attorney, how large a fine Korman could pay, and Memolo said $500 (Tr. 1100–1101). The attorney for the Government objected to the imposition of a fine only and advised Judge Johnson that witnesses were present in court who could prove that Korman furnished the syndicate more distilled spirits than any of the other persons indicted as suppliers. He further told Judge Johnson that Judge Welsh had imposed substantial jail sentences and fines on three persons who were "in the same category as Korman," and urged that Korman should be given a jail sen-

tence not less severe. Judge Johnson sentenced Korman to a fine of $500 and imprisonment for a year and a day, but suspended execution of the prison sentence and placed Korman on probation for five years. (Tr. 1101–1102.)

Phillip Katz, a second cousin of Greenes (R. 123), who had been told many times by Greenes that he could "fix" cases in the federal court in Scranton (see p. 39, *infra*), testified that following a conversation with Korman in New York (R. 124–125, 127), he telephoned Greenes and told him that he had a man who "has got a case up in Scranton" (R. 129–130). Greenes told Katz to "Bring him on" (R. 130).

In October 1937 Korman filed a petition to be released from probation (Ex. G–29, Tr. 391, 1117–1120). Henry Mowles, the probation officer, filed a recommendation that the petition be granted (Ex. G–30, Tr. 392, 1121–1122) and Judge Johnson granted it (Ex. G–31, Tr. 393, 1123). Houck, Judge Johnson's law clerk (R. 146–147), testified that Judge Johnson terminated the probation without consulting the United States Attorney (R. 152, 187–188). Houck further testified that Judge Johnson told Mowles "to report favorably [on Korman's petition] because he was going to terminate the probation anyhow" (R. 153, 192). Houck also testified that Mowles told him, Houck, that Korman "had a penitentiary sentence behind him," which Mowles had reported in his original report, but that he

had omitted reference to Korman's "record" in his final report (R. 192).

[Greenes admitted referring Korman to Memolo and acting as go-between between Memolo and Donald Johnson, who was to see to it that Korman "wouldn't go to jail." Greenes delivered half of Memolo's fee of $2,500 to Donald, receiving about $100 for himself. (R. 1174–1175.) Greenes also admitted acting as go-between between Memolo and Donald when Korman's probation was terminated. Korman gave Greenes $1,000 or $1,200 on this occasion, and Greenes delivered it to Donald, receiving a "hundred or two" for himself. (R. 1178–1180.)]

DERVAS TOBACCO COMPANY CASE

In August 1937 a petition for reorganization of the Dervas Tobacco Company under the bankruptcy laws was filed (Ex. G–32, Tr. 396). The petition was prepared by Frank Butler, counsel for the company, who testified that he explained to Judge Johnson that the petition was in the usual form except that he was requesting that the company be allowed to remain in possession and operate the business as a going concern (Tr. 767, 769). Judge Johnson ordered that the company be allowed to continue in operation and possession, subject to the supervision of the court (Tr. 782). On October 20, 1937, Judge Johnson entered an order reciting that "after hearing in open court" it was decreed that David Schwartz be appointed trustee to operate the business (Ex.

G–33, Tr. 397, 771–772). Butler testified that he first learned of this order when it was filed (Tr. 770) and that he "wasn't present at any hearing" (Tr. 773). On December 21, 1937, Schwartz petitioned for allowance of a $2,500 fee for his services, which Judge Johnson granted (Ex. G–34, Tr. 397–398, 773–779). Butler testified that he was unaware either of this petition or the order granting it until after entry of the order (Tr. 780); that he and the special master complained to Judge Johnson that the fee was excessive for only two months' work; and that Judge Johnson accordingly reduced the fee to $1,250 (Tr. 779, 789–790, 806). Thereafter Butler implored Judge Johnson to further reduce the fee to $500, pointing out that the company's purpose in requesting leave to remain in possession and operation was to minimize expenses, that Schwartz' appointment was "without any notice" to the company, that no party in interest sought the appointment of a trustee, and that the $1,250 fee was "excessive, exorbitant and entirely disproportionate" to the value of Schwartz' services, would make reorganization impossible, and compel liquidation, in which event the trustee's fee would be only about $100 under Bankruptcy Act regulations (Ex. G–35, Tr. 399; 781–785). Judge Johnson, however, refused further to reduce the fee (Ex. G–36, Tr. 400, 788). Schwartz "finally settled for $1,000," which he "was satisfied to take," and which the company paid to get "rid of it" (Tr. 790–791).

[Greenes admitted conveying to Donald Johnson Memolo's desire that Schwartz be appointed in this case and delivering half of Schwartz' $1,000 fee to Donald, receiving $25 to $50 for himself (R. 1163–1164, 1168).]

WILKES-BARRE & EASTERN RAILROAD COMPANY CASE

This was a reorganization proceeding which arose in 1937 (Ex. G–37, Tr. 402). Judge Johnson appointed Joseph Jennings trustee (Ex. G–38, Tr. 403), and David Schwartz as his counsel (Ex. G–40, Tr. 405). Jennings' salary was $5,000 a year, and Schwartz' was $4,000 (Ex. G–39, Tr. 404).

[Greenes admitted recommending Jennings, at Memolo's suggestion, to Donald Johnson as a good appointment in this case, explaining that he would "play ball." Memolo was practically making all appointments by this time, since Donald accepted his recommendations without question. (R. 1181–1182.) Greenes gave part of Jennings' fees to Donald (R. 1183–1184). Each month Greenes also gave Donald $233 of Schwartz' monthly fees of $333, receiving "the $33" for himself (R. 1193–1195). The "last money" Greenes gave Donald of Jennings' fees was $350, which he received in 1942. Since Donald was out of town, he instructed Greenes to send the money to him by check. Greenes, accordingly, asked his brother Abe to draw a $350 check to Donald's order and sent it to Donald. In 1944, after the "investiga-

tion" started, Jacob Greenes "felt disturbed" about this check because he had thereby involved his innocent brother in the transaction. He accordingly arranged with Donald that Donald "was to say" that the $350 was in payment of a legal fee for having procured for Abe a hotel cigar-stand concession he operated. (R. 1184–1188.)]

GIANT DRY GOODS COMPANY CASE

This was a bankruptcy case that arose in 1940 (Ex. G–43, Tr. 1061). Judge Johnson appointed David Schwartz as receiver (Ex. G–44, Tr. 1061–1062, 1064–1065). He also appointed one Levy and others to appraise the bankrupt's assets (Ex. G–45, Tr. 1062, 1068).

Levy, a dry goods dealer and an uncle of Greenes, testified that he asked Donald Johnson to remember him "if he shall have a chance as an appointment for appraiser" (R. 109–111). He had never before served as an appraiser or in any other capacity in this court (R. 112). Following his appointment he received a $330 fee (R. 113). On the day he received it Greenes demanded and received $200 of it (R. 113–115).

[Greenes admitted giving Donald Johnson 50% of Schwartz' fees in this case (R. 1169–1172). He also knew that Donald had arranged for Levy's appointment, and admitted demanding $200 of his fee, but he could not recall whether he gave Donald any of it or kept it all himself (R. 1171–1172).]

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CENTRAL FORGING COMPANY CASE [5]

This was a reorganization proceeding which arose in 1938 (Ex. G–47, Tr. 415). In December 1941 Judge Johnson appointed Robert Michael successor trustee (Ex. G–48, Tr. 418) and the following month appointed Donald Reifsnyder as his counsel (Ex. G–49, Tr. 419). On July 9, 1943, Michael filed his first and final account as successor trustee (Ex. DJ–12, Tr. 2162).

Michael testified that in 1941 Donald Johnson told him that there was to be a vacancy in the trusteeship in this proceeding and suggested that he ask Judge Johnson to be appointed successor trustee. Michael did so and received the appointment. Michael asked Donald Johnson whom he should have as his counsel. Johnson suggested Reifsnyder, and the latter was appointed. (R. 235–238.)

Michael further testified that he and Reifsnyder negotiated with Harry Knight, George Fenner, and Homer Davis, all of whom had interests in the Maxi Manufacturing Company, concerning a proposed merger whereby that company would take over the assets of the Central Forging

[5] The jury were instructed not to consider, as against petitioner Johnson, certain of the evidence adduced in respect of this particular proceeding. The reason for the instruction and the nature of the evidence to which it pertained are explained in note 6, *infra*, p. 32. The entire evidence relating to this proceeding, however, except as indicated in notes 7 and 8, *infra*, p. 33, was received unqualifiedly as against all other defendants, and may therefore be considered in its entirety as further evidence of the conspiracy charged.

Company, and that such a plan of reorganization was eventually agreed upon (R. 239–244, 285). Reifsnyder told Michael that they would have to "figure out some way to take care of Donald [Johnson]." Michael at first objected to this on the ground that he did not owe Johnson anything, but Reifsnyder explained that "it's understood. It's always done." (R. 245–247.) A plan was accordingly worked out whereby the accounts receivable of the Central Forging Company, which were among the assets that the Maxi Company was to take over, would be evaluated at $20,000 instead of at their true value of $23,000, the $3,000 difference to go to Fenner as alleged payment for legal services, with the understanding that Fenner would retain $500 with which to pay his income tax on the $3,000 and give the balance to Michael and Reifsnyder for delivery to Johnson (R. 246, 249–251, 254). Michael asked Johnson whether he understood the plan and whether it was agreeable to him. Johnson said he understood and approved. (R. 247.) The proposed plan of reorganization was approved by Judge Johnson (Ex. DJ–13, Tr. 2157–2161).

Michael further testified that on April 24, 1942, he and Reifsnyder met with Knight, Fenner, and Davis in Knight's office, and the plan of reorganization was executed by the issuance of deeds, checks, and other papers (R. 251–252). Among the checks issued was one for $3,000 payable to Fenner (R. 252). The parties then went to the

Catawissa National Bank, where the cashier cashed Fenner's check (R. 252–253). The proceeds consisted of six bundles of $20 bills, $500 in each bundle, and each enclosed in a wrapper on which the name of the bank and the amount contained therein appeared. Fenner took one of the bundles, and Michael and Reifsnyder, the other five. (R. 253–255, 281.) Reifsnyder gave this $2,500 to Johnson on April 25 or 26. Johnson argued that he should get a third of that plus a third of Michael's and Reifsnyder's combined fees of $7,900, but Michael insistently opposed this proposal and finally prevailed in his contention that all Johnson should get was the $2,500. (R. 257–258, 265, 272–275.)[6]

[6] In April 1945 Donald Johnson, Michael, Davis, Fenner, and Knight were indicted for feloniously appropriating (count 1) and transferring (count 2) $3,000 of the Central Forging Company's bankrupt estate and for conspiracy to do so (count 3). Reifsnyder was named as a confederate and co-conspirator. (Ex. DJ–1, R. 537–546.) Seven overt acts were alleged in the conspiracy count (R. 544–546). The incidents involved in five of these overt acts were among those testified to by Michael at the instant trial. They were (1) the meeting of Knight, Michael, Fenner, Davis, and Reifsnyder in Knight's office on April 24, 1942 (overt act 1), (2) the cashing of the $3,000 Fenner check on the same day (overt act 3), (3) Fenner's receipt of $500 (overt act 6), (4) Donald Johnson's receipt of $2,500 (overt act 7), and (5) Michael's filing of his first and final account as successor trustee on July 9, 1943 (overt act 5). In November 1945 Donald Johnson was acquitted on all three counts (R. 558–559), and the verdict of acquittal was received in evidence at the instant trial (Ex. DJ–26, R. 558). In his charge to the jury in the instant case, the trial judge pointed out that, while "the charge in that [*Central Forging*] case and the charge in this case" were

Michael further testified that two years later, in May 1944, Donald and Miller Johnson told him that they were being investigated by the F. B. I. and asked him whether he was being investigated, to which Michael replied in the negative (R. 279);[7] and that between July 8 and August 24, 1944, Donald Johnson again asked him whether he was being investigated, to which Michael replied in the affirmative (R. 276–277).[8]

Michael finally testified that on August 24, 1944, he repeatedly committed perjury before the grand jury which subsequently indicted him and others for abstracting $3,000 from the estate of the Central Forging Company and conspiring to do so (see note 6, *supra*, p. 32) by denying Donald Johnson's participation in any way in that case; that he did so in order to protect Johnson; and that he adhered to his false testimony until after he pleaded guilty to the indictment in that case on June 19, 1945 (R. 340, 343–345, 348–358).

Eva Smith, Judge Johnson's secretary from 1926 to 1942 (R. 498, Tr. 1844), testified that on

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different, "some of the facts or incidents" in the two cases were the same (R. 888), and instructed them that, in order to make certain that Donald Johnson would not be tried a second time "on the same set of facts," they should "not retry as to Donald Johnson the charges in the [*Central Forging*] indictment" and should not consider as against him in this case any of the incidents described in the five overt acts, above referred to, alleged in the *Central Forging* indictment (R. 888–889).

[7] This testimony was admitted only as against Donald and Miller Johnson (R. 278).

[8] This testimony was admitted only as against Donald Johnson (R. 278).

May 1, 1942, Donald Johnson visited Judge Johnson, and that on the following day she found $500 in the latter's wallet in one of his bureau drawers while straightening them up at his direction. It was "a package of [$20] bills with the wrapper stamped on it, 'The Catawissa National Bank' and in figures '$500.' " (R. 500–501, 505.) Mrs. Smith, who was very familiar with the sources of Judge Johnson's income, "known" and otherwise (*infra*, pp. 36–37), further testified that Judge Johnson had no account in the Catawissa National Bank, and that this $500 was not "from any of his known sources of income" (R. 502).

The cashier of the Catawissa bank testified that neither Judge Johnson nor any member of the Johnson family had ever had an account there (R. 370).

KOPPELMAN CASE

In January 1943 one Koppelman was charged in four counts of an indictment with embezzling Army cloth (Ex. G–50, Tr. 423). Koppelman's attorney was David Schwartz (Ex. G–51, Tr. 424). Following a jury trial Koppelman was found guilty. On July 29, 1943, Koppelman appeared for sentencing. Judge Johnson made some remarks to the effect that the Government had recovered its cloth, and further stated that he did not intend to take into consideration the fact that Koppelman was then on probation in connection with a prior offense. He then fined

Koppelman $1000 on the first count, suspended the imposition of sentence on the other three counts, and placed him on probation for a year. (Ex. G–52, Tr. 425.)

[Greenes admitted acting as go-between between Schwartz and Donald Johnson in this case. Schwartz paid Donald $15,000 and told him he "expected a directed verdict." When Koppelman was convicted and "it seemed as though the commitment hadn't been carried out," Schwartz and Greenes drove to the Johnsons' summer home and conferred with Judge Johnson and Donald. Donald told his father that Koppelman "never should have been convicted," and that in his opinion a fine would be sufficient punishment, with which Schwartz agreed. Schwartz "was satisfied with the outcome" and paid Greenes for his "help in the matter." (R. 1202–1209.)]

KIZIS CASE

In October 1943 one Kizis was indicted for misapplying bank funds which had come into his custody as cashier (Ex. G–96, Tr. 483).

[Greenes admitted that Memolo, Kizis' attorney, asked him to contact Donald Johnson for help in this case. Donald agreed to "handle it," i. e., see to it that Kizis "wouldn't go to jail," for $15,000. This was agreeable to Memolo. Donald, however, wanted Memolo to put up the money in advance, which Memolo refused to do.

Donald, accordingly, refused to "have anything to do with it." Greenes later learned that Kizis was convicted and sent to jail. (R. 1198–1201.)]

ADDITIONAL EVIDENCE

In addition to the evidence directly relating to particular court proceedings as set forth above, the Government adduced the following evidence tending to show the existence of the conspiracy charged and the participation of petitioners and of Judge Johnson and Memolo in it:

Judge Johnson's "unknown" sources of income and Donald Johnson's connection therewith.—Eva Smith, Judge Johnson's secretary from 1926 to 1942 (R. 498, Tr. 1844), testified that two-thirds of her time was devoted to looking after Judge Johnson's personal affairs, including the handling of all his records relating to his income and expenses, and that she knew all the "known sources" of his income (Tr. 1842–1845). She further testified that Judge Johnson received money in addition to that received from his "known sources" of income and that his receipt of such money, so far as she was aware, began in 1936 (Tr. 1845–1846). In "the beginning" he would give her such additional money in cash to deposit and tell her to "mark" it "a repaid loan," "real estate," or "court expenses." Later he used to spend the money and give her the receipted bills to place in an inventory. (Tr. 1847–1848.) She began to notice, she testified, that "whenever the Judge was in possession of

money" it was always just after a visit from Donald Johnson (R. 498). In 1939, at Judge Johnson's request, she prepared a statement (Ex. G–129, Tr. 1855) showing all the money he had received from sources other than his "known sources" of income (R. 498–500). The moneys listed were falsely attributed to sales of real estate and to "court expenses" (Tr. 1851–1852, 1856, 1857). She and Judge Johnson discussed the various items "as to their correctness" (R. 500, Tr. 1853–1854). Judge Johnson also showed the statement to his son Miller in her presence, explaining that "there was a rumor of an investigation," that "we would have to account in some way for this money," and that "we are not going to be caught with our pants down" (R. 500).

The connection between Memolo and Judge Johnson's orders.—Houck, Judge Johnson's law clerk, testified that several of the orders signed by Judge Johnson were on "blue backers" of Memolo (R. 166–167).

Donald Johnson's interest in cases in which he was not an attorney of record.—Houck further testified that he used to see Donald Johnson about the court and visiting his father, and that his visits "became more frequent as time went on" (R. 147–148). He further testified that he recalled Donald "frequently asking questions about cases that were pending in Court" in which he was not an attorney of record (R. 148–149).

The $350 check sent by Greenes to Donald Johnson.—Abe Greenes, a brother of petitioner Jacob Greenes, testified that he once operated a hotel cigar stand (R. 224). In 1942 Jacob asked Abe to write a $350 check to the order of Donald Johnson. Abe did so, and gave the check to Jacob for cash. Jacob did not explain why he wanted Abe to write the check. (R. 225–227.) In 1944 Abe and Jacob decided on "a story to tell" about this check. According to the "story," the check was in payment of a fee owed by Abe to Donald for his having procured Abe's cigar-stand concession. (R. 228–229.)

An employee of a Swineford, Pennsylvania, bank testified that according to his bank's records Donald Johnson, on October 7, 1942, deposited a $350 check drawn by Abe Greenes to Johnson's order (R. 712–717).

Donald Johnson, the only defendant on trial to take the witness stand, admitted receiving the $350 check from Abe Greenes, but testified that the check was in payment for legal services (R. 683–684). He testified that he recorded this payment in his cash book (R. 683–684, 698–699), which was received in evidence (Ex. DJ–119, Tr. 2935). All the entries in this book for October 1942 were on separate lines except one, in the amount of $350, which was wedged in between two other entries (R. 708–709, 737–738).

F. B. I. agent Sowell testified that he examined Johnson's cash book in April 1944 and that the

October 1942 entry of $350 was not in the book at that time (R. 737–738). Sowell further testified that the total of the October 1942 entries had been increased by $350 from $600.06 to $950.06 between the time he examined the book in 1944 and the trial, the latter figure having been "written over" the former (R. 740–741).

Greenes' claim that he could "fix" cases in the federal court in Scranton.—Phillip Katz testified that on many occasions Greenes told him that if he ever heard of "anybody that has any case up in Scranton" he should refer such person to him, Greenes (R. 132, 134), who would "take care of him" (R. 133). Greenes particularly mentioned "The Federal Court" as a court in which he could get cases "fixed" (R. 138).

Greenes' associations with Donald Johnson.—William Beacham, whose employer shared an office suite with Donald Johnson in Scranton, testified that from 1934 to 1941 petitioner Greenes was a "frequent visitor" of Donald in the latter's office, the visits occurring sometimes "several times in one week" (R. 462–464). Beatrice Moran, Donald Johnson's secretary, testified that Greenes visited Donald approximately once a week from 1939 to 1941; that Greenes was not a client of Donald; and that on two or three occasions, when Donald was not in his office, Greenes left an envelope with her with a message for Donald (R. 493–496).

Greenes' associations with Judge Johnson and Donald Johnson—David Martin, Judge Johnson's bailiff from 1934 to 1941 (R. 516), testified that on half a dozen occasions around 1939 or 1940 he observed Greenes and Donald Johnson entering Judge Johnson's chambers together when Judge Johnson was there (R. 519–520, 522–523).

Greenes' associations with Memolo.—Beatrice Tighe, Memolo's secretary from 1933 to 1936, testified that Greenes, though not a client of Memolo, visited the latter's office from two to eleven times a week; and that on three to five occasions she drew checks on Memolo's account at his direction, cashed them, and delivered the money to Greenes on the street or in the hallway of the building (R. 996–999).

ARGUMENT

1. Petitioner Johnson contends that the Government failed to prove a general, over-all conspiracy to obstruct justice as charged; that the most that was proved was a number of separate, disconnected conspiracies having no common figure other than Judge Johnson, who, by his acquittal, was "removed * * * as an alleged conspirator"; that there was no proof that he, petitioner Johnson, had any connection with eight of these conspiracies; and that therefore, under the rule of *Kotteakos* v. *United States,* 328 U. S. 750, it was error to try him jointly with the other alleged conspirators (Pet. 20–30). The contention is without merit, for the Government did

prove a general conspiracy as charged and further proved that petitioner Johnson was one of its key members, the others including at least Judge Johnson, Memolo, and Greenes.

(a) *The effect of Judge Johnson's acquittal on appellate review of the sufficiency of the evidence as to his convicted co-defendants.*—At the outset it is necessary to point out that petitioner Johnson is in error in assuming that the acquittal of Judge Johnson "removed him as an alleged conspirator, and the key figure" (Pet. 20–21). The evidence adduced, which we shall review, showed that Judge Johnson was, in the language of the trial judge (R. 822), the "heart and core" of the conspiracy alleged. The jury's acquittal of him and conviction of others, therefore, constituted "a rational inconsistency between the verdicts" (*United States* v. *Austin-Bagley Corporation,* 31 F. 2d 229, 233 (C. C. A. 2), certiorari denied, 279 U. S. 863). It is well settled, however, that the acquittal of an alleged member of a conspiracy is no bar to the conviction of other alleged members, even though under the Government's theory the person acquitted was a key member of the conspiracy; and by the same token, on appellate review of the sufficiency of the evidence to sustain conspiracy convictions, the reviewing court is not precluded from considering the evidence adduced against an alleged key coconspirator who was acquitted, to the extent necessary in determining the adequacy of the evidence adduced against his

convicted fellows. *United States* v. *Hare,* 153 F. 2d 816, 818–819 (C. C. A. 7), certiorari denied, 328 U. S. 836; *Joyce* v. *United States,* 153 F. 2d 364, 367–368 (C. C. A. 8), certiorari denied, 328 U. S. 860; *United States* v. *Fox,* 130 F. 2d 56, 57 (C. C. A. 3), certiorari denied, 317 U. S. 666; *Baxter* v. *United States,* 45 F. 2d 487, 488–489 (C. C. A. 6); *United States* v. *Austin-Bagley Corporation,* 31 F. 2d 229, 233 (C. C. A. 2), certiorari denied, 279 U. S. 863; *Belvin* v. *United States,* 12 F. 2d 548, 551 (C. C. A. 4), certiorari denied, 273 U. S. 706. It is proper, therefore, for the purpose of showing that a general conspiracy was proved as charged and that petitioner Johnson was one of its members, to review the evidence tending to prove the corruptness of Judge Johnson's judicial acts and his participation in the alleged conspiracy.

(b) *The corruptness of Judge Johnson's judicial acts and his participation in the conspiracy.*— The corruptness of Judge Johnson's judicial acts and his participation in the alleged conspiracy were proved by six principal types of evidence. These were the questionable character of the acts themselves; the corrupt transfers of money, usually in the nature of "kick-backs," which followed them; Judge Johnson's proved receipt of part of such corrupt money in the *Central Forging Company* case; his receipt of money from "unknown" sources of income; his secret conferences, unexplainable under any hypothesis of innocence, with Memolo and Donald Johnson in

the *Williamsport* case; and finally his admissions against interest. Following is a brief resume of such evidence:

MOUNT JESSUP COAL COMPANY CASE

(1) *Judge Johnson's reversal of Kilcullen's second report and reinstatement of the latter's original finding.*—Judge Johnson had five months earlier ordered Kilcullen to reconsider his original finding. Following the reversal and the payment of the Winton tax claim, Memolo, the attorney for the Winton collector, retained exactly half of the recovery for "Expenses," his attorney's fee and ordinary expenses being over and above this. (*Supra,* pp. 7–8.) While Judge Johnson's actions here were *per se,* perhaps, merely suspicious, the inference of corruption is justified when they are viewed, as they must be, in the setting of the evidence as a whole against him.

PENNSYLVANIA CENTRAL BREWING COMPANY CASE

(2) *Judge Johnson's orders directing the payment of $2,500 and $2,473 to Maloney.*—Maloney had agreed to go "fifty-fifty" with Greenes if the latter got him the appointment as auditor. Both of Maloney's petitions for fees were prepared for him by Memolo. Maloney gave Greenes half of both fees pursuant to their arrangement. Maloney worked only three months and his services were admittedly worth less than a third of the amount Memolo had him charge. (*Supra,* pp. 9–10.)

(3) *Judge Johnson's appointment of Townsend as third receiver.*—Whereas the other receivers were experienced wire rope men who had drawn very substantial salaries as officers of the company before the receivership, Townsend had previously been a $3,000-a-year manager of a 45-mile-long railroad. Yet he was appointed co-receiver at the same compensation—$1,000 a month—as the others. His only qualification for this position would appear to have been his long-standing acquaintance with the Johnsons. He continued his railroad work and received his railroad salary throughout the more than three years of his receivership duties. Shortly after his appointment, Townsend agreed with Miller Johnson to pay Albert Johnson, Jr. 50% of his fees in order to help Albert, Jr. and Donald Johnson pay "some obligations." Townsend made these corrupt payments throughout his term as receiver. (*Supra,* p. 11.)

(4) *Judge Johnson's appointment of Memolo as co-counsel to the receivers.*—Though the order of appointment stated that it was made after consultation with the receivers and with their approval, receiver Townsend testified that he had no idea Judge Johnson was contemplating such a move, and also that he knew of no particular need for a second attorney. Judge Johnson later tried to explain why he had named a second attorney, but

Decker, the original attorney, contradicted him in this respect. (*Supra,* p. 12.) The corruptness of the appointment of Memolo is further evidenced by the very identity of the appointee, in view of the utter corruptness of his activities reflected throughout the record.

(5) *Judge Johnson's orders increasing the compensations of counsel to the receivers and later of the receivers themselves.*—The motive for increasing Memolo's compensation was inferably corrupt for the same reasons that the good faith of his appointment was suspect. The motive for the insistence that Townsend's compensation be increased along with that of the other receivers, notwithstanding Townsend's candid statement that he was not entitled to an increase, must be judged in the light of the fact that half of Townsend's fees were going regularly each month to Albert, Jr. and Donald, pursuant to his arrangement with Miller. (*Supra,* pp. 12–13.)

(6) *Judge Johnson's conspiracy with Memolo, Moore, and Donald Johnson to permit Bethlehem Steel to foreclose its mortgage for the corrupt consideration of $225,000.*—The Williamsport receivership was extremely successful and there was every indication that the company could be restored to its stockholders within a reasonable time. Judge Johnson himself insisted that the stockholders had a clear equity, which any plan of reorganization would

have to take into account. His change of attitude in this respect and the beginning of the proceedings which were to culminate in Bethlehem's acquisition of the company at foreclosure for an amount far less than its true value were roughly contemporaneous with Memolo's corrupt overtures to Mumford, McMath, and finally to Moore. Memolo's corrupt dealings with Moore and his secret conferences with Judge Johnson and Donald Johnson during the foreclosure proceedings point inescapably to a conspiracy to "sell out" Williamsport to Bethlehem. The haste with which the final decree confirming the sale was filed is further evidence of this conspiracy. The evidence showed overwhelmingly that the "fees" of Memolo, Crolly, Martin Memolo, and Maloney were nothing more than an elaborate device for the payment of the corrupt consideration of approximately $225,000. (*Supra,* pp. 13–22.)

CONTINENTAL CIGAR CORPORATION CASE

(7) *Judge Johnson's appointment of Crolly as a trustee and of Memolo as counsel to the trustees* (*supra,* pp. 23–24).—While there is no evidence (admissible against Judge Johnson) specifically pointing to anything corrupt in respect of these appointments, their *bona fides* must be appraised in the light of Crolly's proved complicity in the *Williamsport* conspiracy (*supra,* pp. 19–21) and of the thoroughly corrupt activities of Memolo reflected throughout the record.

(8) *Judge Johnson's suspension of Korman's prison sentence.*—Katz, who had been told many times by Greenes that he could "fix" cases in the federal court in Scranton, told Greenes about Korman's pending case, and Greenes told Katz to "Bring him on." Though the government attorney told Judge Johnson that he had witnesses who could prove that Korman was a major figure in the case and urged that he should receive a substantial jail sentence, Judge Johnson nevertheless merely fined Korman. He did, it is true, also sentence him to a year in prison, but this was obviously only "for the record," since he promptly suspended its execution. The corruptness of the sentence is further evidenced by the fact that Korman's attorney was Memolo. (*Supra,* pp. 24–25.)

(9) *Judge Johnson's release of Korman from probation.*—This action was taken without even consultation with the United States Attorney. Mowles, the probation officer, was told by Judge Johnson to "report favorably" on Korman's petition since he "was going to terminate the probation anyhow." Korman "had a penitentiary sentence behind him," which Mowles had reported in his original report, but which he omitted from his final report. The omission was obviously due to Judge Johnson's instruction. (*Supra,* pp. 25–26.)

DERVAS TOBACCO COMPANY CASE

(10) *Judge Johnson's appointment of Schwartz as trustee.*—The debtor company had requested leave to continue in operation and possession of its business as an economy measure, which Judge Johnson permitted for a while. His sudden order appointing Schwartz recited that it was made "after hearing in open court," but Butler, the company's attorney, testified that he knew of no such hearing. (*Supra,* p. 27.)

(11) *Judge Johnson's allowance of Schwartz' fee.*—The original allowance was $2,500 for only two months' work, which Butler protested was entirely unnecessary. When both Butler and the special master protested the excessiveness of this fee, Judge Johnson reduced it to $1,250. Butler besought Judge Johnson further to reduce it to $500, pathetically outlining all the reasons why even $1,250 was entirely out of line and would make reorganization impossible, but Judge Johnson summarily refused his request. Schwartz eventually "settled for $1,000," which he was glad to get, and which the company paid to get "rid of it." (*Supra,* p. 27.)

WILKES-BARRE & EASTERN RAILROAD COMPANY CASE

(12) *Judge Johnson's appointment of Schwartz as counsel to the trustee* (*supra,* p. 28).—While there is no evidence (admissible against Judge Johnson) specifically pointing to corruptness in respect of this

appointment, it is fair to recall, in judging its *bona fides,* that Schwartz was the trustee involved in the corrupt appointment in the *Dervas Tobacco Company* case (*supra,* p. 48) as well as the attorney for the embezzler Koppelman, who received from Judge Johnson a sentence that was unexplainably lenient under any hypothesis of good faith (*infra,* p. 51).

GIANT DRY GOODS COMPANY CASE

(13) *Judge Johnson's appointment of Levy as appraiser.*—Levy had asked Donald Johnson to "remember" him if he should ever "have a chance as an appointment for appraiser." In due time, Levy received such an appointment from Judge Johnson in this proceeding, though he had never acted in a similar capacity before. On the very day Levy received his fee of $330, Greenes came around to demand a $200 "kick-back." (*Supra,* p. 29.)

CENTRAL FORGING COMPANY CASE

(14) *Judge Johnson's appointment of Michael as successor trustee and of Reifsnyder as his attorney.*—Michael applied for this appointment at the suggestion of Donald Johnson, who informed him that there was to be a vacancy in the trusteeship. Donald also suggested Reifsnyder as Michael's attorney. (*Supra,* pp. 30–31.) In view of the subsequent events in this proceeding, the corruptness of these appointments is obviously inferable.

(15) *Judge Johnson's approval of the proposed plan of reorganization.*—Under the plan, the Maxi Company was to pay only $20,000 for Central Forging Company assets worth $23,000, the $3,000 difference to go to Fenner as alleged payment for "legal services," with the understanding that he would retain $500 with which to pay his income tax for the purpose of "taking care of" Donald Johnson (*supra,* pp. 31–34). That Judge Johnson must have known of this corrupt deal is evidenced by the fact that he himself received at least $500 of this "pay-off" money.

(16) *Judge Johnson's receipt of $500 of the corrupt $2,500 paid to Donald Johnson.*—The $2,500 with which Michael and Reifsnyder "took care of" Donald Johnson was delivered to him on April 25 or 26, 1942 (*supra,* p. 32). Judge Johnson's secretary testified that on May 1 Donald visited his father and that on the following day she found $500 in $20 bills enclosed in a wrapper bearing the name "Catawissa National Bank" and the amount, "$500," in Judge Johnson's wallet in one of his bureau drawers. This description of the money corresponded exactly with the description of each of the bundles of money received in exchange for the $3,000 Fenner check, $2,500 of which was paid to Donald Johnson. (*Supra,* pp. 32–34.)

KOPPELMAN CASE

(17) *Koppelman's sentence.*—While the United States was fighting a war of sur-

vival, Koppelman was found guilty on four counts of embezzling Army cloth. He was on probation at the time, moreover, in connection with a prior offense. Instead of sending Koppelman to jail, where he belonged, Judge Johnson imposed a light fine on one count and suspended imposition of sentence on the other three counts, for the alleged reason that the embezzled cloth had been recovered. (*Supra,* pp. 34–35.) When it is recalled that Koppelman's attorney was Schwartz, the trustee involved in the *Dervas Tobacco Company* case (*supra,* p. 48), and when the action is viewed in the light of the evidence as a whole against Judge Johnson, the only reasonable conclusion that can be drawn is that Koppelman's lenient sentence was bought and paid for.

THE "ADDITIONAL EVIDENCE"

(18) *Judge Johnson's receipt of money from "unknown" sources of income.*—The receipt by Judge Johnson of money from "unknown" sources of income (*supra,* pp. 36–37) is further obvious proof of the corruptness of his judicial acts.

(19) *Judge Johnson's admissions in regard to his money from "unknown" sources.*—Eva Smith testified concerning her preparation, at Judge Johnson's direction, of a statement showing all the money received by him from his "unknown" sources of income, the statement attributing the money to false sources. She further testified that Judge Johnson explained

to Miller that the reasons why he had caused the statement to be drawn up were that "there was a rumor of an investigation being made," that "We would have to account in some way for this money," and that "We are not going to be caught with our pants down." (*Supra*, pp. 36–37.)

(c) *The unitary character of the conspiracy and Donald Johnson's membership in it.*—From the evidence so far reviewed (under (b), *supra*), it is evident that the Government proved that Judge Johnson entered into corrupt transactions with one or more persons in each of ten [9] separate court proceedings. Memolo was proved to have been implicated in five of these corrupt arrangements (the *Mount Jessup Coal Company, Pennsylvania Central Brewing Company, Williamsport Wire Rope Company, Continental Cigar Corporation,* and *Korman* cases), Greenes in three (the *Pennsylvania Central Brewing Company, Korman,* and *Giant Dry Goods Company* cases), and Donald Johnson in three (the *Williamsport Wire Rope Company, Giant Dry Goods Company,* and *Central Forging Company* cases). We think that even if there were no other evidence this would suffice to show that at least these four defendants were members of a general conspiracy to sell justice and judicial favors whenever the oppor-

[9] There was no generally admissible evidence of corruptness in the *Kizis* case, the evidence in that proceeding being limited to petitioner Greenes (*supra*, pp. 35–36).

tunity arose, and that therefore their inclusion as codefendants in a single conspiracy indictment was proper under the rule of the *Kotteakos* case, 328 U. S. 750. See also, *Blumenthal* v. *United States,* Nos. 54–57, decided December 22, 1947. There was further evidence, however, from which it can reasonably be inferred that these four defendants were common and key figures in all the specific corrupt transactions described, and which removes all doubt that they were members of the unitary conspiracy to obstruct justice as charged. This further evidence may be recapitulated as follows:

(1) Eva Smith's testimony that she began to notice that whenever Judge Johnson was in possession of money from corrupt sources it was always shortly after he had seen Donald (*supra,* pp. 36–37);

(2) Houck's testimony that Donald Johnson's visits with his father "became more frequent as time went on" and, further, that Donald used frequently to ask him, Houck, questions about cases pending in court in which he was not an attorney of record (*supra,* p. 37);

(3) Greenes' sweeping claim to Katz that he could "fix" cases in the federal court in Scranton (*supra,* p. 39), a claim which he substantiated in the *Korman* case;

(4) Beacham's testimony that Greenes was a "frequent visitor" of Donald Johnson, the visits occurring sometimes several times a week (*supra,* p. 39);

(5) Beatrice Moran's testimony that Greenes visited Donald Johnson weekly, though not a client, and that Greenes would sometimes leave an envelope with her for Donald when the latter was out (*supra,* p. 39);

(6) Martin's testimony that he observed Greenes and Donald Johnson entering Judge Johnson's chambers together on half a dozen occasions when Judge Johnson was there (*supra,* p. 40);

(7) Beatrice Tighe's testimony that Greenes, though not a client of Memolo, used to visit him from two to eleven times a week, and that on three to five occasions she drew checks on Memolo's account at his direction, cashed them, and delivered the money to Greenes on the street or in the hallway of the building (*supra,* p. 40);

(8) Houck's testimony that several of the orders signed by Judge Johnson were on "blue backers" of Memolo (*supra,* p. 37);

The cumulative force of this further evidence, we submit, proves beyond doubt that Donald Johnson, Greenes, and Memolo did not merely enter from time to time into individual, particular, "small" conspiracies with one or another of themselves, Judge Johnson, and others, but that all four were parties to a single general conspiracy, unlimited in its scope, to obstruct justice and defraud the United States as charged. Their joint trial, consequently, was proper under the

rule of the *Kotteakos* case. See also *Canella* v. *United States*, 157 F. 2d 470 (C. C. A. 9).[10]

2. Petitioner Johnson's further contention that the evidence is insufficient to support the verdict as to him (Pet. 31–34) is patently without merit. The evidence already reviewed in connection with Johnson's first contention necessarily included much of the evidence directed against him specifically. The only evidence already reviewed which may not be considered in determining the sufficiency of the evidence against him specifically

[10] It was necessary, of course, for Judge Johnson, Donald Johnson, Memolo, and Greenes, in carrying out their over-all conspiracy, to enter into particular corrupt agreements from time to time with other persons in connection with the various court proceedings that were to be affected by their grand conspiracy. Thus Kilcullen was brought into their broad plan in connection with the *Mount Jessup* case, Maloney in the *Pennsylvania Central Brewing Company* and *Williamsport* cases, Townsend and Moore in the *Williamsport* case, etc. It must be emphasized that this case involves no question as to the propriety of trying such "temporary" participants in the main fraud jointly with its four "permanent" members. The persons in this case having a thus limited relation to the grand conspiracy occupied positions similar to those of Kotteakos, Lekacos, and Regenbogen in the *Kotteakos* case, and of Wyckoff and McCormac in the *Canella* case. The four "grand conspirators," on the other hand, occupied positions precisely analogous to those of Canella and Campbell in the *Canella* case (see 157 F. 2d, at 478–479). Similarly, if in the *Kotteakos* case two or more "common and key" figures be postulated in place of the actual single figure, Brown, the members of the grand conspiracy here would be analogous to them. In short, to use the "wheel" figure of the *Kotteakos* case, Judge Johnson, Donald Johnson, Memolo, and Greenes constituted the center of the wheel, whose spokes connected them with the many persons in the same category as Kilcullen, Maloney, Townsend, and Moore.

is the evidence that he conspired with Michael, Reifsnyder, and the others involved in the *Central Forging Company* case fraudulently to abstract $3,000 from the bankrupt estate and that he received $2,500 of this money himself (see (b) (15) and (16) under point 1, *supra*). The reason why that evidence may not be considered as against Johnson is explained in note 6, *supra*, p. 32. Even eliminating this evidence from consideration, however, the remaining evidence against him plainly warranted his conviction (see (b) (3), (6), (13), and (14), and (c) (1), (2), (4), (5), and (6) under point 1). There is, moreover, the following additional evidence against Johnson:

(1) Michael's testimony that in May 1944 and again sometime between July 8 and August 24, 1944, Donald Johnson came to ask him whether he, Michael, was being investigated (*supra*, p. 33). These were obviously not missions of innocence.

(2) The $350 check incident. Abe Greenes testified that he drew a $350 check to Donald Johnson's order in 1942 at the request of his brother Jacob and gave it to Jacob in exchange for $350 in cash. Abe did not know the purpose of the transaction, but in 1944, he admitted, he and Jacob decided on a false "story to tell" about the check—the "story" being that the check was in payment of a fee owed by Abe to Donald for his having procured Abe's cigar-stand concession. The corrupt nature of this payment is conclusively

shown by the F. B. I. agent's testimony that a $350 item was added to the entries in Donald Johnson's cash book for October 1942 sometime between April 1944 and the trial. (*Supra*, pp. 38–39.) The jury were fully justified in inferring that this corrupt payment to Donald Johnson had some connection with the conspiracy charged.

It is not, of course, a valid criticism of the Government's case against petitioner Johnson to say that the evidence against him was largely circumstantial, since conspiracy can often be proved in no other way. *United States* v. *Manton*, 107 F. 2d 834, 839 (C. C. A. 2), certiorari denied, 309 U. S. 664. Two courts have upheld the sufficiency of the evidence to warrant submission of the question of Johnson's guilt to the jury. There is clearly no occasion for this Court to disturb their findings. Cf. *Delaney* v. *United States*, 263 U. S. 586, 589–590.[11]

3. Petitioner Johnson's further contention that the Government failed to prove the commission of an overt act within the limitations period (Pet. 35–42) is also without merit.[12]

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[11] Petitioner Greenes also challenges the adequacy of the proof of a general conspiracy and the sufficiency of the evidence to sustain his conviction (Pet. 11–13). In view, however, of his admissions before the grand jury, in which he fully confessed his major role in the vast conspiracy, his contentions in this respect obviously require no answer.

[12] Petitioner Greenes also makes this contention (Pet. 13–15), but it scarcely can be taken seriously in view of the fact that his grand jury testimony contained numerous admissions of overt acts committed within three years of the indictment's return (see pp. 10, 35, *supra*).

The indictment was returned on September 11, 1945 (R. 1) and the jury were instructed that they must find that an overt act in furtherance of the conspiracy was committed within three years prior thereto (R. 814, 863). The following overt acts were proved to have been committed within that period:

(1) Greenes' sending of the $350 check to petitioner Johnson on or about October 7, 1942 (*supra*, p. 38);

(2) Michael's commission of perjury, on August 24, 1944, before the grand jury which subsequently indicted him and others in the *Central Forging Company* case, for the admitted purpose of protecting Donald Johnson; he adhered to this false testimony until he pleaded guilty to that indictment on June 19, 1945 (*supra*, p. 33);[13]

(3) Michael's filing of his first and final account as successor trustee in the *Central Forging Company* case on July 9, 1943 (*supra*, p. 30) (alleged overt act No. 33, R. 1084);

(4) Judge Johnson's sentencing of Koppelman on July 29, 1943 (*supra*, pp. 34–35) (alleged overt act No. 6, R. 1082).

It is true that the first two of these overt acts were not alleged in the indictment, and that the trial judge instructed the jury that they were required to find that "an overt act as charged"

[13] Since it was part of the conspiracy charged to conceal its existence (R. 1080), Michael's perjury was clearly an overt act in furtherance of it.

was committed (R. 814; see also R. 821, 863). However, that instruction was obviously too favorable to the defendants (as Johnson admits (Pet. 35, 41)), since it is well settled that the Government is not limited in its proof to the overt acts charged. *Lias* v. *United States,* 51 F. 2d 215, 217 (C. C. A. 4), affirmed, 284 U. S. 584; *Meyers* v. *United States,* 36 F. 2d 859, 861 (C. C. A. 3), certiorari denied, 281 U. S. 735; *Worthington* v. *United States,* 1 F. 2d 154, 155 (C. C. A. 7), certiorari denied, 266 U. S. 626.[14] It is also true that the third of the above overt acts was one of the items of evidence which the jury were instructed not to consider as against petitioner Johnson (see note 6, *supra,* p. 32). It was, however, admissible as against all other defendants, and consequently the jury were entitled to consider it in determining whether the conspiracy charged had continued to within the limitations period, even though they could not consider it in weighing the specific question of the guilt of petitioner Johnson. In any event, the fourth of the above-listed overt acts was both

[14] Furthermore, there can be no question as to the fact of Donald Johnson's receipt of the $350 check, since he admitted it, his only contention being that it was an innocent fee payment by Abe Greenes (*supra,* p. 38). The Government's proof to the contrary, however, which included the testimony of Abe himself that the "story" about the $350 being a fee was purely imaginary, was overwhelming (*supra,* pp. 38–39).

alleged and proved and was admissible against all defendants.[15]

4. Petitioner Johnson's further contention (Pet. 42–44, 6–7) that the trial judge erred in applying the doctrine of collateral estoppel is likewise unmeritorious. As we pointed out in note 6, *supra,* p. 32, Johnson had previously been acquitted of conspiring with Michael, Reifsnyder,

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[15] It should be pointed out, moreover, that the trial judge's instruction that the jury were required to find an overt act that occurred after September 11, 1942 (three years prior to the indictment's return) was far more favorable to the defendants than was required, in view of the special war-time statute tolling the statute of limitations for certain offenses. That statute (Act of August 24, 1942, c. 555, § 1, 56 Stat. 747, as amended by the Act of July 1, 1944, c. 358, § 19 (b), 58 Stat. 667 (18 U. S. C., Supp. V, 590a)) provides in pertinent part:

"The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner * * * shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run * * *."

This statute was directly applicable to the offense alleged in the instant indictment, which charged a conspiracy to defraud the United States as well as to obstruct justice (*supra,* pp. 4–5). Its applicability was evidently overlooked at the trial. The effect of the statute was to make the crucial date so far as the statute of limitations was concerned—i. e., the date after which an overt act was required to be found—not September 11, 1942, as the jury were told, but August 24, 1939 (three years prior to the enactment of the above statute).

and the others involved in the *Central Forging Company* case to abstract $3,000 from the bankrupt estate of that company, and of committing the substantive offense. The indictment in the earlier case and the verdict of acquittal as to Johnson were received in evidence in the instant case (note 6, *supra*), and the jury were instructed, in effect, that in weighing the question of Johnson's guilt or innocence they were to assume his innocence of the charges in the *Central Forging Company* indictment (R. 888–889). They were expressly told that they could "not retry as to Donald Johnson the charges in the [*Central Forging*] indictment" (R. 888). Moreover, the judge went much farther than necessary by his further instruction that the jury could not consider as against Johnson any evidence which tended to prove any of the five overt acts mentioned in the earlier indictment of which evidence was received in this case (R. 889). One of those overt acts, the judge explained, was the alleged receipt by Johnson of $2,500, and even though he did not believe that "that fact was squarely an issue in that case," [16] he nevertheless told them,

[16] In his opinion overruling motions for judgments of acquittal notwithstanding the verdicts, the judge explained, as follows, why he believed that Johnson's acquittal in the *Central Forging* case did not by any means necessarily establish that the jury found that Johnson did not receive this $2,500: "It is perfectly apparent in this connection that Donald Johnson may have received the money as charged in the former indictment as an overt act, but the jury might have

in order to be "perfectly sure" that Johnson's rights were fully protected, that they could not consider even that evidence against him in this case. Under the doctrine of collateral estoppel, all that the judge was required to tell the jury was that Johnson's acquittal in the earlier case established, for this case, his innocence of the charges in the earlier case. See *United States* v. *De Angelo,* 138 F. 2d 466 (C. C. A. 3). Clearly he was not required to tell them that they could not consider in this case evidence of the overt acts allegedly committed in furtherance of the conspiracy charged in the earlier case, since it is evident that the jury in that case might very well have believed those acts to have been proved and still have thought Johnson innocent of the charges of the indictment, which was all that their verdict of not guilty established.

5. Both petitioners contend (Johnson Pet. 44–45; Greenes Pet. 16–18) that the trial judge should have declared a mistrial because the prosecutor, in his rebuttal argument to the jury, called defense witness Moore a "criminal conspirator as

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found that he had no idea that the money came from the trustee or was part of the assets of the bankrupt estate. He may have thought that it was part of the legitimate fees allowed to the attorneys which was paid to him on account of his supposed influence" (R. 933). He stated that his instruction to ignore Johnson's receipt of this $2,500 in considering his connection with the conspiracy charged in this case went "very much further than defendant Donald Johnson was entitled to have the court go under any rule whatsoever" (R. 933–934).

established by the evidence in this case" (see R. 796–797). It is claimed that "there was absolutely no basis" for this remark (Johnson Pet. 44). The contentions are patently insubstantial. The evidence adduced (pp. 14–22, *supra*) proves beyond question that the prosecutor's characterization of Moore, far from being false or exaggerated, was no more than fair comment. Defense counsel, in his summation, had previously extolled Moore as a man of "fine qualities" (Tr. 3700), "an example of an honest man and a good fellow" (Tr. 3701), and a "fine old gentleman" (Tr. 3703). It was fair rebuttal, therefore, for the prosecutor to portray him to the jury in the truer light.

6. In *Edgington* v. *United States*, 164 U. S, 361, this Court held that an instruction that "evidence of good character could only be considered if the rest of the evidence created a doubt of defendant's guilt" (p. 366) was erroneous, observing (*ibid.*):

> Whatever may have been said in some of the earlier cases, to the effect that evidence of the good character of the defendant is not to be considered unless the other evidence leaves the mind in doubt, the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create

> a reasonable doubt, although without it the other evidence would be convincing.

Petitioner Johnson contends that the instructions in this case in respect of character evidence failed to meet the requirements laid down in the *Edgington* case (Pet. 46–50). This contention is also meritless. The judge made it perfectly clear to the jury that they were to convict if they had no reasonable doubt of guilt after considering all the evidence, including the evidence of good reputation, and, conversely, that they were to acquit if they had such a doubt after considering all the evidence, likewise including the evidence of good reputation (R. 895–896). This instruction was clearly correct. It is true, as stated in the *Edgington* case, that "The circumstances may be such that an established reputation for good character * * * would alone create a reasonable doubt," but plainly this Court did not mean thereby to imply that a jury had to be so instructed *in haec verba,* as Johnson seems to assume. Rather, this Court was merely stating what might result in some cases from the jury's application of the correct rule. It is uniformly held to be proper to refuse a charge that evidence of good reputation may alone suffice to create a reasonable doubt. *Boehm* v. *United States,* 123 F. 2d 791, 812 (C. C. A. 8), certiorari denied, 315 U. S. 800; *Haffa* v. *United States,* 36 F. 2d 1, 5 (C. C. A. 7), certiorari denied, 281 U. S. 727; *Kreiner* v. *United States,* 11 F. 2d 722, 726 (C.

C. A. 2), certiorari denied, 271 U. S. 688; *Kaufmann* v. *United States*, 282 Fed. 776, 785 (C. C. A. 3), certiorari denied, 260 U. S. 735.

7. Petitioner Johnson further contends that the trial judge erred in not instructing the jury that they must find the dates of the beginning and end of the conspiracy on the ground, apparently, that in the absence of such an instruction the jury might have based their verdict of guilty on improper acts not connected with the conspiracy charged (Pet. 50–51). However, the jury were told that they must find that the conspiracy alleged existed and that it continued to within three years of the indictment's return (R. 814). They were further cautioned that "even if the parties hereto are proven guilty of having done unlawful acts that might otherwise be defined as crimes, the only crime that they can be convicted of under this indictment is the crime of conspiracy" (R. 819). The judge also made it abundantly clear to the jury that the defendants were on trial only for the broad general conspiracy charged and that even if the jury believed beyond a doubt that a number of "subsidiary conspiracies" had been proved, that would not suffice to warrant verdicts of guilty (R. 831–832). There were similar instructions to the same effect, moreover, which fully covered the matter (see R. 826–829, 831–832). Consequently there is no basis whatever for this contention.

8. Both petitioners urge that the trial judge invaded the province of the jury by telling them that some of the overt acts alleged had been proved (Johnson Pet. 51–52; Greenes Pet. 18–22). The allegedly offending remarks of the judge are as follows (R. 821):

> In the indictment in the case at Bar there are charged forty-six overt acts * * *. Some of them have been proved by the United States.

It is manifest from the context in which these words occur, however (see the language which immediately follows), that by "overt acts" the judge meant nothing more than acts in the objective sense—i. e., dissociated from any possible corruptness arising from their having been done to further the objects of the alleged conspiracy. That some overt acts in this sense had been established was conceded (see R. 901–902). The judge very clearly left it to the jury to decide whether such acts or any others they might find had been committed for the purpose of furthering the objects of the conspiracy. Subsequently, moreover, after his charge had been criticized by counsel (R. 900–902), the judge supplemented his prior instructions in this respect in such a way as to leave no possible doubt that it was the jury's function to determine whether an overt act done to further the conspiracy had been proved (R. 907). No further criticism of the charge in this respect was made.

9. The Government introduced in evidence petitioner Greenes' admissions made before the grand jury on two days (R. 1103). Greenes contends that it was error to permit the Government to introduce these admissions without also requiring it to introduce the remainder of his testimony before that body, given on thirteen other days (Pet. 23–26). There is no merit in the contention. The rule that if part of an admission is introduced the remainder must also be introduced means no more, as the court below pointed out, than that any admissions against interest must be "given sufficiently in their context so that the jury may have an accurate notion of what was said and under what circumstances" (R. 1231).

Here, the admissions received consisted of Greenes' complete, word-for-word testimony on two successive days, and there was no attempt whatever to select only the most damaging admissions, torn from context. Plainly there was no reason, as the court below observed (*ibid.*), "why the record should have been unduly cluttered with all the Grand Jury testimony." See *Medlock* v. *State,* 108 Tex. Cr. 274, 279; *Shaw* v. *State,* 73 Tex. Cr. 337, 339; cf. *Schoborg* v. *United States,* 264 Fed. 1, 9 (C. C. A. 6), certiorari denied, 253 U. S. 494.

CONCLUSION

The judgments below are correct, and no conflicts of decisions are involved. We therefore

respectfully submit that the petitions for writs of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 459

DONALD M. JOHNSON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR REHEARING

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Donald M. Johnson,
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PETITION FOR REHEARING

To the Honorable, the Chief Justice and Associate Justices of Supreme Court of the United States:

Donald M. Johnson, Petitioner, respectfully prays that he be granted a rehearing in the matter of his Petition for Writ of Certiorari to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, which Writ was denied by your Honorable Court on January 12, 1948, and as grounds for such rehearing sets forth the following:

1. In his Petition for Writ of Certiorari, the said Donald M. Johnson alleged as a reason for the allow-

ance of the Writ that the decision of the said Circuit Court was in conflict with the decisions of this Court relative to the requirement that an overt act be committed within the statutory period in order to convict him of conspiracy under 18 USCA §88.

2. In its Brief, page 58, the Government stated that the following overt acts were proven to have been committed within the statutory period:

(1) Greenes' sending of the $350 check; (2) Michael's commission of perjury before the Grand Jury; (3) Michael's filing of his First and Final Account as Trustee in the Central Forging case; and (4) Judge Johnson's sentencing of Koppelman.

3. In its said Brief, page 58, the Government admitted that the jury was instructed by the Trial Judge that in order to convict they must find "an overt act as charged", and that two of the overt acts were not alleged in the Indictment, and therefore were not before the jury as overt acts; said two alleged overt acts are (1) Greenes' sending of the $350 check to Johnson on or about October 2, 1942; and (2) Michael's commission of perjury on August 24, 1944.

4. The third alleged overt act, namely, Michael's filing of his Account in the Central Forging case, was not available against Donald M. Johnson because the Trial Judge expressly so ruled in his Charge to the Jury (889a), and the Circuit Court of Appeals decided that the said matter of Michael's filing could not be used against your Petitioner (1226).

5. The fourth alleged overt act, namely, the sentencing of Koppelman, was not available likewise against Donald M. Johnson because it was proven only by the testimony of Jacob Greenes, co-defendant, before the Grand Jury, which testimony was read into the record in this case; it was admitted only against Greenes, and so limited by the Trial Judge in his Charge (868a). The Circuit Court also decided that the Koppelman matter having been proven only by Grand Jury admissions was available against the person who made the admission, namely, Greenes, and therefore, not against Donald M. Johnson (1226).

6. The Government in its Answer, at page 59-60, states that the fourth of the above-listed overt acts, namely the Koppelman matter, was both alleged and proved, and was admissible against all defendants. This is a misstatement of the fact. The Koppelman matter was proven as above-indicated, only by the Grand Jury testimony of Greenes, and was by the Court limited to Greenes, and the Circuit Court in its Opinion so considered the matter.

7. The only alleged overt act within the statutory period proven against Donald M. Johnson was the sending of the $350 check from Abe Greenes to him, and admittedly this matter was not before the jury as an overt act, not having been charged as such in the Indictment, and therefore the ruling of the Circuit Court that the jury might base its conviction of Donald M. Johnson upon this incident was without legal foundation.

8. We respectfully submit that this admission by the Government in its Brief (service of which was accepted by the attorney for the Petitioner on January 9, 1948) that the Trial Judge required the jury to find such overt acts as were alleged as overt acts in the Indictment, and that the sending of the $350 check was not alleged in the Indictment, is such an intervening circumstance of controlling effect as to require a rehearing in this case, there being no competent and admissible evidence to connect Petitioner with any overt act charged in the Indictment after September 11, 1942.

9. The argument made by the Government that it could have proven acts not alleged in the Indictment and that the jury could have based its verdict upon such acts is correct in the abstract, but in this case the jury was required to follow the instruction of the Trial Judge, and therefore to find an overt act as charged and not some other act which might appear somewhere in the proof, and therefore it did not consider such other acts.

10. The Government also points out in the footnote, on page 60, of its Brief, that the Statute of Limitations was tolled during the War, and therefore the crucial date, September 11, 1942, was not correct, and that this matter was evidently overlooked at the trial. Regardless of the fact that the tolling of the Statute of Limitations was overlooked, the record shows that for the purpose of this case at least the Statute was not tolled because it was the duty of the Government's attorneys to call that matter to the attention of the court if they intended to rely upon such tolling of Statute.

Not having done so, the Government cannot now complain. As we attempted to show in our Petition and Brief, the jury was bound by the law as given to them by the Trial Judge in his Charge; to this point, the Government wholly fails to reply.

11. A further reason for granting a rehearing is that since the filing of our Petition the Supreme Court has handed down its Opinion, on January 5, 1948, in the case of *Robert Sealfon v. United States,* at 174 October Term, 1947, reversing his conviction. This decision bears on the question of res adjudicata, viz, that *all* of the facts which had been proven in the Central Forging Company case, in which a verdict of acquittal was entered as to Donald M. Johnson, were res adjudicata in the present case. The Circuit Court, in our case, stated that the law as quoted on the question of res adjudicata was correct, but refused to apply it to the facts of our case. One of the objections raised by Petitioner at the trial was that he was not permitted to show the facts which had been proven in the Central Forging case, and to read that record into the evidence so that the jury might compare those facts with the facts which were being submitted by the Government on the same matter. In our case, the Trial Judge merely told the jury that *any overt act* which was alleged in the Indictment in the Central Forging case and which was alleged also in the Indictment in the present case could not be considered against Donald M. Johnson. In speaking of res adjudicata, this court says in the Sealfon case that the question is "whether the jury's verdict in the conspiracy trial was a determination favorable to

the Petitioner of the *facts* essential to the conviction of the substantive offense. This depends upon the *facts* adduced at each trial, and the instructions under which the jury arrived at its verdict at the first trial." In our case, the question is whether the verdict in the Central Forging case was a determination favorable to Petitioner of the *facts* essential to conviction in the present case. It will be noted that the word "facts" is used and not "overt acts", and this is the whole foundation of our complaint of the action of the Trial Court in this regard: that it limited the comparison to *overt acts,* and refused to consider the *facts* of the cases.

Respectfully submitted,

CHARLES J. MARGIOTTI,

SETH W. RICHARDSON,

ALFONS B. LANDA,

DAVIES, RICHBERG, BEEBE, BUSICK & RICHARDSON,

Attorneys for Petitioner.

CERTIFICATE

I, Charles J. Margiotti, counsel for Donald M. Johnson, Petitioner, hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and further, that the Petition is restricted to the grounds specified in Amended Rule 33 (2), viz., intervening circumstances of substantial or controlling effect, being the admissions of the Government in its Answer relative to overt acts, which show that there was no overt act which the jury could legally find against this Petitioner, and, therefore, his conviction was in violation of 18 USCA §88, and also the misstatement of the Government that testimony relative to the Koppelman case was available against all defendants; and secondly, the filing of the Opinion of the Supreme Court in the Sealfon case, after the Petition for Writ of Certiorari had been filed.

CHARLES J. MARGIOTTI,
Counsel for Petitioner